(25,702)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 872.

BERNARD FLEXNER, PLAINTIFF IN ERROR,

vs.

JOHN FARSON, JR., WILLIAM FARSON, AND JOHN A. McELROY, DOING BUSINESS AS PARTNERS UNDER THE NAME AND STYLE OF FARSON, SON & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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a UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield, on Tuesday, the Sixth Day of April, in the year of our Lord One Thousand Nine Hundred and Fifteen, within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; Justice William M. Farmer, Justice Orrin N. Carter, Justice Frank K. Dunn, Justice George A. Cooke, Justice Charles C. Craig, Justice Warren W. Duncan, Patrick J. Lucey, Attorney General; Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it Remembered, to-wit, on the 17th day of March, A. D. 1915, the same being one of the days in vacation before the term of Court aforesaid, a record of proceedings in the Circuit Court of Du Quoin County was filed by appellant, Bernard Flexner, in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

1 10090. 61.

Record to Supreme Court.

Gen. No. B 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., et al.

Filed March 17, 1915. Chas. W. Vail, Clerk of Supreme Court.

2 UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas Before the Honorable Benjamin W. Pope, Judge of the City Court of Du Quoin, of the State of Illinois, Holding a Branch of the Circuit Court of Cook County at the Request of the Judges of said Circuit Court, at a Term Thereof Begun and Holden at the Court-house, at Chicago, in said County and State, on the Third Monday, Being the 18th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, and of the Independence of the United States the One Hundred and Thirty-ninth.

Present: Honorable Benjamin W. Pope, Judge of the City Court of Du Quoin Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, State of Illinois; Maclay Hoyne, State's Attorney; John E. Traeger, Sheriff.

Attest:
JOHN W. RAINEY, *Clerk.*

Be it remembered that heretofore, to-wit, on the 6th day of March A. D. 1914 a certain Præcipe was filed in the office of the Clerk of said Court, in words and figures following to-wit:

3 STATE OF ILLINOIS,
County of Cook, ss:

Circuit Court of Cook County, March Term, A. D. 1914.

BERNARD FLEXNER, Plaintiff,
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. McELROY, Doing Business as Partners under the Name and Style of Farson, Son & Co., Defendants.

Damages, $2,000.00.

The Clerk of said Court will issue a Summons in the above entitled cause to said Defendant in a plea of Debt to the damage of said Plaintiff in the sum of Two Thousand Dollars, direct the same to the Sheriff of Cook County to execute and make it returnable to the March Term of said Court A. D. 1914.

R. D. STEVENSON,
Plaintiff's Attorney.

To John W. Rainey, Clerk.

CHICAGO, Mar. 6, 1914.

Thereupon on the same day to-wit on the 6th day of March A. D. 1914, a certain People's Writ of Summons issued out of the Office of the Clerk of said Court and under the Seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

4 STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you summons John Farson, Jr., William Farson, and John A. McElroy, doing business as partners under the name and style of Farson, Son & Co., if they shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the term thereof, to be holden at the Court House in the City of Chicago in said Cook County, on the third Monday of April, A. D. 1914, to answer unto Bernard Flexner in a plea of debt, to the damage of said plaintiff, as it is said, in the sum of Two Thousand Dollars.

And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

Witness: John W. Rainey, Clerk of our said Court, and the seal thereof, at Chicago, in said County, this 6th day of March, A. D. 1914.

[SEAL.] JOHN W. RAINEY, *Clerk.*

(Endorsement *of* the Back:) Alias. G. D. No. B. 1392. Circuit Court of Cook County, April Term A. D. 1914. Bernard Flexner vs. John Farson, Jr., et al. Summons. R. D. Stevenson, P'l'ff's Att'y.

Pd. 4.25
M. .... .30

The within named defendants not found in my county this Mar. 16, 1914.

MICHAEL ZIMMER, *Sheriff,*
By JAMES S. PRENDERGAST, *Deputy.*

5 And thereupon on the same day, to-wit, on the 6th day of March, A. D. 1914, a certain Declaration was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company.

Now comes the plaintiff, by R. D. Stevenson, his attorney, and complains of John Farson, Jr., William Farson, and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, in a plea of debt.

For that whereas the plaintiff heretofore on, to-wit, the 31st day of January, in the year 1914, in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, the same being a court of general jurisdiction duly created and organized under the laws of said State, by the judgment of said court recovered a judgment against said defendants in a certain action pending before said court, in which the plaintiff herein was plaintiff and the defendants herein were defendants, for the sum of One Thousand Five Hundred and Three Dollars ($1,503.), with interest thereon at the rate of six per cent (6%) per annum from December 11, 1911, until paid, and his costs in said suit expended, as more fully appears from the record thereof remaining in said court;

6 That at the date on which said suit was instituted, to-wit, September 27, 1913, and at the date on which said judgment was rendered, to-wit, January 31, 1914, and at all times intervening between said dates, there was in full force and effect throughout the State of Kentucky a certain statutory provisions known as Subsection 6 of Section 51 of the Kentucky Civil Code, which provision was substantially as follows:

"In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of, such business in this state, in the county where the business is carried on, or in the county where the cause of action occur-ed."

The plaintiff further avers that upon all the said dates hereinbefore mentioned the said defendants in said suit, and the defendants herein, were non-residents of said State of Kentucky, and residing in the State of Illinois, and were engaged in business in said State of Kentucky, said business being carried on in the City of Louisville, in said Jefferson County, Kentucky, and consisting in the buying and selling of bonds and securities; and at all of said dates one Washington Flexner was the resident agent, in said Jefferson County, of said defendants, and the person in charge of such business so carried on by said defendants in said State of Kentucky;

The plaintiff further avers that the said provision of this statute of the State of Kentucky, hereinabove set forth, was in full force and effect in said State at and long prior to the date on which said defendants first engaged, as aforesaid, in business in said State of Kentucky, and has continued so in force ever since said date;

That the summons of said Jefferson Circuit Court, issued in said cause and directed to said defendants and each of them, was 7 duly executed and served on said Washington Flexner, in person, in said Jefferson County, as agent of said defendants, in accordance with and as provided by said statute and the practice of said court, and that thereby the said court duly secured jurisdiction of said defendants;

That said judgment still remains in full force and effect, yet the said defendants, nor either of them, have not paid to the plaintiff the said sum of money by him recovered, amounting to the sum of One Thousand Five Hundred. and Three Dollars ($1,503), with interest thereon at the rate of six per cent. (6%) per annum from December 11, 1911, until paid, and the costs of said plaintiff therein expended, but refuses so to do; to the damage of plaintiff in the sum of Two Thousand Dollars ($2,000), and therefore he brings this suit.

BERNARD FLEXNER,
By R. D. STEVENSON,
His Attorney.

STATE OF ILLINOIS,
County of Cook, ss:

R. D. Stevenson, being first duly sworn, state- upon oath that he is the attorney for, and agent of, Bernard Flexner, plaintiff in the above cause; that the nature of said plaintiff's demand is a suit upon a judgment of the Jefferson Circuit Court of the State of Kentucky, and that there is due from defendants to plaintiff, after allowing to defendants all just deductions, credits and set-offs, the sum of One Thousand Five Hundred and Three Dollars ($1,503) together with interest thereon at the rate of six per cent. (6%) from December 11, 1911.
R. D. STEVENSON.

Subscribed and sworn to before me this 6th day of March, A. D. 1914.
[SEAL.] WILLIAM K. OTIS,
Notary Public.

8 And afterwards to-wit, on the 26th day of March A. D. 1914 a certain People's Writ of Alias Summons issued out of the Office of the Clerk of said Court and under the Seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We again command you that you summons John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson, Son & Co., if they shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the term thereof, to be holden at the Court House in the City of Chicago in said Cook County, on the Third Monday of April, A. D. 1914, to answer unto Bernard Flexner in a plea of debt to the damage of said plaintiff, as it is said, in the sum of Two Thousand Dollars.

And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

Witness: John W. Rainey, Clerk of our said Court, and the seal thereof, at Chicago, in said County, this 26th day of March A. D. 1914.
[SEAL.] JOHN W. RAINEY, *Clerk.*

(Endorsed on the Back:) G. D. No. —. Circuit Court of Cook County, March Term, A. D. 1914. Bernard Flexner vs.
9 John Farson, Jr., et al. Summons. R. D. Stevenson, P't'ff's Att'y.

Pd. 50.

Served this writ on the within named defendant William Farson by reading the same to him and at the same time delivering a copy thereof to him this 9th day of April 1914.

MICHAEL ZIMMER, *Sheriff*,
By JAMES S. PRENDERGAST,
Deputy.

And afterwards to-wit, on the 21st day of April, A. D. 1914 a certain Plea was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company.

I.

Now comes the defendant, William Farson, and defends the wrong and injury when etc. and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in his said declaration pleaded and set forth because he says that before and at the time said alleged suit mentioned in said declaration was instituted in said Jefferson Circuit Court
10 in and for Jefferson County, State of Kentucky, and continuously from thence hitherto, he, the said defendant, was, and still is, a resident and citizen of the State of Illinois, and that during no portion of said period of time, was he, the said defendant, a resident or citizen of the State of Kentucky, that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said defendant, within the territorial limits of the said State of Kentucky, that he, the said defendant, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he the said defendant, at any time voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court, in said alleged suit, wherefore he, the said defendant alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky did not acquire jurisdiction of him, the said defendant, in said alleged suit and that said alleged judgment mentioned in said declaration was rendered without due process of law as guaranteed to him, the said defendant, by the Constitution of the United States, and that said judgment is not a valid and binding obligation against him, the said defendant, and this he, the said defendant, is ready to verify, etc.

II.

And for a further plea in this behalf the said defendant, William Farson, comes and defends the wrong and injury when, etc. and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in his said declaration pleaded and set forth because he says that said alleged judgment rendered in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said declaration was a joint judgment against him, the said defendant, and the defendants John Farson, Jr., and John A. McElroy; that before and at the time said alleged suit mentioned in said declaration, and in which said judgment was rendered, was instituted in said Jefferson Circuit
11 Court, and continuously from thence hitherto he,
William Farson, was and still is a resident and citizen of the State of Illinois, and said John Farson, Jr., and John A. McElroy, were and still are, residents and citizens of the State of New York, and that during no portion of said period — time was he, the said William Farson, or said John Farson, Jr., or said John A. McElroy, or any or either of them, residents or citizens of the state of Kentucky, that no summons, or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said William Farson, or upon said John Farson, Jr., or John A. McElroy or any or either of them, *was* in the territorial limits of the State of Kentucky that he the said William Farson, or John Farson Jr., or John A. McElroy or any or either of them, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court nor did he the said William Farson or John Farson, Jr., or John A. McElroy or any or either of them, at any time voluntarily submit his *of* their person or persons to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said William Farson alleges that said Jefferson Circuit Court, in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him and said William Farson or of said John Farson, Jr., or of said John A. McElroy or of any or either of them in said alleged suit and that said alleged judgment mentioned in said declaration was rendered without due process of law as guaranteed to him, the said William Farson by the Constitution of the United States, and that said judgment is not a valid and binding obligation against him, the said William Farson, and this he, the said defendant, William Farson, is ready to verify, etc.

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III.

And for a further plea in this behalf the defendant, William Farson, comes and defends the wrong and injury when, etc., and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in his declaration pleaded and set forth because he says that at the time said alleged suit mentioned in said declaration was instituted in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, and at the time of said alleged service of summons on said Washington Flexner in manner and form as the same is pleaded and set forth in said declaration and at the time said judgment was rendered in said Jefferson Circuit Court there was no law in force in the State of Kentucky under and by virtue of which service of summons in manner and form as alleged and set forth in said declaration to have been had and made in said suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, could be obtained and a judgment in personam rendered against citizens or residents of said State of Kentucky, and he the said defendant, alleges that in said proceedings had in said Jefferson Circuit Court, he, the said defendant, was denied equal privileges and immunities with the citizens and residents of said State of Kentucky guaranteed to him, the said defendant, by the Constitution of the United States, wherefore he, the said defendant, alleges that said subsection 6, section 51 of said Kentucky Civil Code mentioned in said declaration and by virtue of which said service of summons was had, is unconstitutional and void, and he, the said defendant, further alleges that no summons or other process issuing out of said Jefferson Circuit Court in 13 said suit was at any time personally served upon him, the said defendant, within the territorial limits of said State of Kentucky; that he the said defendant, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said defendant, at any time voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said defendant, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him, the said defendant, in said alleged suit, and that said alleged judgment mentioned in said declaration is not a valid and binding obligation against him, the said defendant, and this he the said defendant, is ready to verify, etc.

IV.

And for a further plea in this behalf the defendant, William Farson, comes and defends the wrong and injury when, etc. and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in said declaration pleaded and set forth because he says that at the time of the commencement of this suit he, the said defendant, William Farson, and the said defendants, John Farson, Jr., and John A. McElroy, were not doing business as partners under the name and style of Farson, Son & Company, nor has he, the said William Farson, and the defendants John Farson, Jr., and John A. McElroy, at any time since the commencement of this suit, engaged in business as partners under the name and style of Farson, Son & Company, and this he, the said defendant, William Farson, is ready to verify, etc.

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V.

And for a further plea in this behalf the defendant, William Farson, comes and defends the wrong and injury when, etc. and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, William Farson, by reason of anything in said declaration pleaded and set forth because he says that at the time of the commencement of said suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said declaration, and for a long time prior thereto, and at the time of said alleged service of summons on said Washington Flexner in manner and form as the same is pleaded and set forth in said declaration, and at the time of the alleged entry of said judgment, he the said defendant, William Farson, and the said defendants, John Farson, Jr., and John A. McElroy, were not doing business as partners under the name and style of Farson, Son & Company, and this he, the said defendant, William Farson, is ready to verify, etc.

VI.

And for a further plea in this behalf the said defendant William Farson, comes and defends the wrong and injury when etc. and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, because he says that at the time of the commencement of said alleged suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said declaration, and at the time of said alleged service of summons upon said Washington Flexner in manner and form as the same is alleged and set forth in said declaration, the said Washington Flexner was not then, nor had he been for a long time prior thereto, nor has he been at any time subsequent thereto, an agent of, manager for or person in charge of the business of said defendant, William Farson, in the State 15 of Kentucky or elsewhere, nor was he, the said Washington Flexner, during any of said time, the agent of, manager for or person in charge of the business of the firm of Farson, Son & Company, or any of the members of said firm in said State of Kentucky or elsewhere, wherefore he, the said defendant William Farson, alleges that said alleged service of summons in said suit in said Jefferson Circuit Court pleaded and set forth in said declaration was void, and he, the said defendant, William Farson, alleges that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said defendant, William Farson, or any or either of the defendants in said suit mentioned in said declaration within the territorial limits of said State of Kentucky, and that he, the said defendant, William Farson, or any or either of the other defendants in said suit mentioned in said declaration did not at any time appear personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he the said defendant, William Farson, or any or either of the other defendants in said suit mentioned in said declaration, at any time voluntarily submit his or their person or persons to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said defendant, William Farson, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him, the said defendant, William Farson, or of any or either of the defendants in said suit mentioned in said declaration, and that said alleged judgment mentioned in said declaration is not a valid and binding obligation against him, the said defendant, William Farson, and this he, the said defendant, William Farson, is ready to verify, etc.

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VII.

And for a further plea in this beh*laf*, the defendant William Farson, comes and defends the wrong and injury when etc. and say that the plaintiff ought not to have his aforesaid action against him, the said defendant, William Farson, by reason of anything in said declaration pleaded and set forth because he says that this suit is brought upon an alleged joint judgment rendered in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, against him the said defendant, William Farson, and the defendants, John Farson, Jr., and John A. McElroy; that at the time of the commencement of said alleged suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said declaration, and for a long time prior thereto and continuously from thence hitherto, said John A. McElroy was not, and is not, a member of the firm of Farson, Son & Company, and that at no time since long prior to the commencement of said suit in said Jefferson Circuit Court mentioned in said declaration up to the present time was said Washington Flexner an agent of, manager for or person in charge of the business of said John A. McElroy in said State of Kentucky or elsewhere, and that said alleged service of summons on said Washington Flexner in manner and form as the same is pleaded and set forth in said declaration was not, and is not, a valid and legal service of summons on said John A. McElroy by virtue of said subsection 6, section 51 of the Kentucky Civil Code mentioned in said declaration or otherwise; that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time served upon said John A.
17 McElroy within the territorial limits of said State of Kentucky
or elsewhere; that he, the said John A. McElroy, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said John A. McElroy voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore the said defendant, William Farson, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of said John A. McElroy in said alleged suit, and that said alleged judgment mentioned in said declaration was not and is not a valid and binding judgment or obligation against him, the said John A. McElroy, and he, the said defendant, William Farson, alleges that by reason of the premises said judgment was not, and is not, a valid and binding obligation against him, the said William Farson, and this he, the said defendant, William Farson, is ready to verify, etc.

VIII.

And for a further plea in this behalf the said defendant, William Farson, comes and defends the wrong and injury, when, etc., and

says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in his said declaration pleaded and set forth, because he says that before and at the time said alleged suit mentioned in said declaration was instituted in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, and continuously from thence hitherto he, the said defendant, was and still is a resident and citizen of the state of Illinois and that during no portion of said period of time was he, the said defendant, a resident and citizen of the state of Kentucky; that during
all and every portion of said period of time there were in full
18 force and effect in said state of Kentucky the following provisions of the Civil Code of said State, to-wit:

Section 48. "Unless otherwise provided, the summons shall be served by delivering, or if acceptance be refused, by offering to deliver a copy of it to the person to be summoned."

Section 56. "Excepting infants (under the age of fourteen years)—other than married women—and persons of unsound mind and prisoners, if a defendant be out of this state the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served on him, and may cause a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated. The officer before whom the affidavit is made shall certify that the affiant is personally known by him to be worthy of credit."

Section 57. "If the defendant be—

1. A corporation having no agent in this state, known to the plaintiff, upon who- a summons can be lawfully served; or,

2. A non-resident of this state and believed to be absent therefrom; or,

3. Have departed therefrom with intent to delay or defraud his creditors; or,

4. Have been absent therefrom four months; or,

5. Have left the county of his residence to avoid the service of a summons; or,

6. So conceal himself that a summons cannot be served upon him; or,

7. If his name and place of residence be unknown to the plaintiff, the clerk shall, subject to the provisions of section fifty-eight, make upon the petition *and* order warning the defendant to defend the action on the first day of the next term of the court, which does not commence within sixty days after the making of the order."

Section 60. "A defendant against whom a warning order is made and for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

Section 61. "The plaintiff may, at any time before judgment, have a summons served on the defendant if found in this state, although a warning order may have been previously entered against him; and after such service the case shall proceed as in other cases of actual service."

Section 75. "Excepting the actions mentioned in sections sixty-two to sixty-seven, both inclusive, and in section seventy and section seventy-six an action against a defendant who may be proceeded against by a warning order, as is authorized by section fifty-seven, must be brought in a county in which the defendant resides at the commencement of the action, or in which he has property; or in which a person resides against whom he has a valid claim for money or property."

19 Section 78. "An action which is not required by the foregoing sections of this article to be brought in some other county may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned."

Section 80. "In an action brought pursuant to section seventy-eight, against several defendants, no judgment shall be rendered against any of them, upon the service of a summons out of the county in which the action is brought, if no one of them be summoned in that county, nor resided therein when the action was commenced; nor if the action be discontinued or dismissed as to the defendant who resided, or was summoned, in that county; nor if judgment be rendered in his favor, unless a defendant summoned out of that county make defense without objecting to the jurisdiction of the court; provided, That a judgment for a defendant, who resided or was summoned in that county, upon a plea of his discharge as a bankrupt, shall not prevent a judgment against any other defendant, in an action brought before the commencement of the proceedings in which the discharge was obtained; but, after such judgment upon a plea of discharge in bankruptcy, a defendant not summoned in the county, nor residing therein at the commencement of the action, may, by answer, deny the liability of such bankrupt. The issue as to the original liability of such bankrupt shall be tried as if he were still a party, and the plaintiff shall not have judgment against the defendant not summoned nor residing in the county, unless it be decided that the bankrupt was originally liable."

Section 419. "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this state as provided in section fifty-six, and who has not appeared in the action."

Said defendant further alleges that during all of said period of time hereinbefore mentioned there was no other law in force in said state of Kentucky providing for any other method of service of summons in suits at law similar to said suit in said Jefferson Circuit Court, mentioned in said declaration, upon citizens and residents of said state of Kentucky transacting business as individuals or as partners in said state, and who were not infants under the age of fourteen years, or presons of unsound mind, or prisoners, or members of a community of Shakers.

Said defendant further alleges that no summons or other process issuing out of said Jefferson Circuit Court in said suit was, at any time, personally served upon him, the said defendant, within the territorial limits of said state of Kentucky or elsewhere, nor was
a copy of any such summons, at any time, delivered to him,
20 the said defendant, nor was delivery of a copy of any such
summons, at any time, offered to him the said defendant,
within the territorial limits of said state of Kentucky; and that he, the said defendant, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he the said defendant, at any time, voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit.

And said defendant alleges that by reason of the premises said subsection 6 of section 51 of said Kentucky Civil Code is unconstitutional and void, that it is an unlawful discrimination between citizens and residents of said state of Kentucky and citizens and residents of the state of Illinois and other states of the United States; that said judgment in said Jefferson Circuit Court mentioned in said declaration was obtained without due process of law as guaranteed to said defendant by the Constitution of the United States; that the entry of said judgment is said Jefferson Circuit Court mentioned in said declaration as a judgment in personam against said defendant was an attempt to deprive him, the said defendant, of the equal privileges and immunities with residents and citizens of said state of Kentucky guaranteed to him, the said defendant, by the Constitution of the United States; that said Jefferson Circuit Court in and for the county of Jefferson, state of Kentucky, was without jurisdiction of him, the said defendant, in said alleged suit, and that said alleged judgment mentioned in said declaration was and is unlawful and void and is not a valid and binding obligation against him, the said defendant, and this he, the said defendant is ready to verify, etc.

WILLIAM FARSON *Defendant.*

ALFRED W. CRAVEN,
By BUSBY, WEBER, MILLER & ROBINSON,
His Attorneys.

21 STATE OF ILLINOIS,
County of Cook, ss:

William Farson, being first duly sworn, on oath deposes and says that he is the defendant who files herewith the foregoing pleas in this cause; that he verily believes that he has a good defense to this suit on the merits to the whole of plaintiff's demands, and that the nature of such defense is that the judgment rendered in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, upon which this suit is based, is void, and not a valid and binding obligation against him because said Jefferson Circuit Court did not have jurisdiction over him when said judgment was rendered for the various reasons set forth in said pleas, and because said judgment in said Jefferson Circuit Court purports to be a joint judgment or obligation against this affiant, John Farson, Jr., and John A. McElroy, but said Jefferson Circuit Court did not have jurisdiction over said John Farson, Jr., and said John A. McElroy for the reasons set forth in said pleas and said judgment was therefore void as to them.

Affiant further says that at the time said suit was instituted in said Jefferson Circuit Court at the time said alleged service of summons was had on the said Washington Flexner and at the time this suit was instituted this affiant, John Farson, Jr., and John A. McElroy were not engaged in business as partners under the name and style of Farson, Son & Company, but that long prior to the commencement of said suit in said Jefferson Circuit Court said John A. McElroy withdrew from said firm of Farson, Son & Company and from that time continuously up to the present time he has had no interest whatever in said firm.

22 And further affiant sayeth not.

WILLIAM FARSON.

Subscribed and sworn to before me this 21st day of April, 1914.

[SEAL.] ARTHUR J. DONOVAN,
Notary Public.

And afterwards, to-wit on the 13th day of June, A. D. 1914 the following proceedings were had and entered of record in said Court to-wit:

Debt. B. 1392.

B. FLEXNER
v.
JOHN FARSON et al.

On motion of attorney for plaintiff it is ordered that leave be and the same is hereby given the plaintiff to file instanter an amended declaration herein;

It is further ordered that the defendants be and they are hereby required to plead thereto within ten days from this date.

23 And thereupon on the same day, towit, on the 13th day of June A. D. 1914 a certain Amended Declaration was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER

vs.

JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company.

Amended Declaration.

Now comes the plaintiff, by his attorneys and files this, his amended declaration, and complains of John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, in a plea of debt.

For that whereas the plaintiff heretofore on, to-wit, the 31st day of January, in the year 1914 in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, the same being a court of general jurisdiction duly created and organized under the laws of said State, by the judgment of said Court recovered a judgment against said defendants in a certain action pending before said court, in which the plaintiff herein was plaintiff and the 24 defendants herein were defendants, for the sum of One Thousand Five Hundred and Three Dollars, ($1,503), with interest thereon at the rate of six per cent (6%) per annum from December 11, 1911, until paid, and his costs in said suit expended, as more fully appear from the record thereof remaining in said court;

That said action and the said judgment therein recovered were based upon and grew out of a certain transaction involving the sale by said defendants to the plaintiff, of certain bonds on or about the 11th day of December, 1911, said transaction occur-ing within the City of Louisville, Jefferson County and State of Kentucky, all of which more fully appears from the record of said action and judgment remaining in said Circuit Court in and for Jefferson County, Kentucky;

That on said last mentioned date, towit, December 11, 1911, and for a long time prior thereto, said Defendants were a partnership composed of John Farson, Jr., William Farson and John A. McElroy doing business under the firm name of Farson, Son & Company, and were non-residents of the State of Kentucky, and were engaged in said City of Louisville, Jefferson County and State of Kentucky, in the business of buying and selling bonds;

That on said date and for a long time prior thereto, one Washington Flexner was the manager and agent and person in charge, in said City and County, of said business so carried on by said defendants in the State of Kentucky, and conducted on behalf of said

partnership, the said transaction hereinabove referred to; and that under the laws of said State, the said Washington Flexner continued from said December 11, 1911, until the institution of the
25 said suit in Jefferson County, to be the agent of the defendants on whom process could be served in suits or proceedings arising out of said transaction;

That at said last above mentioned date, to-wit, December 11, 1911, and for a long time prior thereto, and at the date on which said suit was instituted, to-wit, September 27, 1913, and at the date on which said judgment was rendered, to-wit, January 31, 1914, and at all times intervening between said dates, there was in full force and effect throughout the State of Kentucky a certain statutory provision known as Sub-Section 6 of section 51 of the Kentucky Civil Code, which provisions was substantially as follows:

"In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent of, or person in charge of, such business in this State in the County where the business is carried on, or in the county where the cause of action occur-ed."

That the summons of said Jefferson Circuit Court, issued in said cause and directed to said defendants and each of them, was duly executed and served on said Washington Flexner, in person, in said Jefferson County, as agent of said defendants, in accordance with and as provided by said statute and the practice of said court; and that thereby the said court duly secured jurisdiction of said defendants; and that said judgment is entitled, within the State of Illinois, to full faith and credit under and by virtue of the provisions of Section 1 of Article 4 of the Constitution of the United States;

That said judgment still remains in full force and effect,
26 yet the said defendants, nor either of them, have not paid to the plaintiff the said sum of money by him recovered, amounting to the sum of One Thousand Five Hundred and Three — ($1,503) with interest thereon at the rate of six per cent (6%) per annum from December 11, 1911, until paid, and the costs of said plaintiff therein expended, but refuses so to do, to the damage of plaintiff in the sum of Two Thousand Dollars, ($2,000), and therefore he brings this suit.

BERNARD FLEXNER,
By R. D. STEVENSON,
By J. S. LAURENT,
His Attorneys.

And afterwards to-wit, on the 22nd day of June, A. D. 1914 a certain Stipulation was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., et al.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above entitled cause, that the time for defendant, William Farson, to plead or demur to the amended declaration may be extended to and including Thursday, June 25, 1914. 27

Dated June 20, A. D. 1914.

R. D. STEVENSON AND
J. S. LAURENT,
Attorneys for Plaintiff.
BUSBY, WEBER, MILLER & ROBINSON,
Attorney- for Defendant.

And afterwards to-wit on the 22nd day of June A. D. 1914, the following proceedings were had and entered of record in said Court to-wit:

Debt. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., et al.

On the stipulation of the parties to this suit filed herein it is ordered that the time within which the defendants are to plead or demur to the amended declaration filed herein be and the same is hereby extended to and inclusive of June 25, A. D. 1914.

28 And afterwards, towit on the 24th day of June A. D. 1914 the following proceedings were had and entered of record in said Court to-wit:

Debt. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., et al.

On motion of attorney for defendant, William Farson, it is hereby ordered that the plaintiff be required to file herein a copy of the Record of the judgment upon which this suit is based within 3 days and that this cause be continued until such copy is filed.

And afterwards to-wit on the 26th say of June A. D. 1914, a certain Record sued on was filed in the office of the Clerk of said Court, in words and figures following to-wit:

29 *Index.* **Page.**

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29½ #82650.

STATE OF KENTUCKY,
County of Jefferson:

Pleas Before the Hon. Thomas R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, at the Courthouse, in the City of Louisville, State and County aforesaid, and at the Times and Dates Hereinafter Mentioned.

TRANSCRIPT OF RECORD.

BERNARD FLEXNER, Plaintiff,
vs.
FARSON, SON & COMPANY, a Partnership Composed of John Farson, Jr., William Farson, and John A. McElroy, Defendant.

Be it remembered, that heretofore to-wit: on the 27th day of September, 1913, came the plaintiff, by counsel, and filed his Petition and three (3) Exhibits herein.

Said Petition is in words and figures as follows to-wit:

30 Jefferson Circuit Court, Chancery Branch, — Division.

BERNARD FLEXNER, Plaintiff,
vs.
FARSON, SON & COMPANY, a Partnership Composed of John Farson, Jr., William Farson, and John A. McElroy, Defendant.

Petition in Equity.

Plaintiff, Bernard Flexner, states that the defendant Farson, Son & Company, is a partnership composed of John Farson, Jr., William Farson and John A. McElroy.

That on or about the 11th day of December, 1911, and prior thereto, the said Farson, Son & Company was engaged in the business of buying and selling bonds in the City of Louisville, County of Jefferson, Kentucky, and that one Washington Flexner was the agent and representative of said Farson, Son & Company, and in the charge and conduct of its business in the State of Kentucky.

Plaintiff states that heretofore, on or about the 11th day of December, 1911, in the City of Louisville, Jefferson County, Kentucky, the defendant Farson, Son & Company through its said agent, Washington Flexner, sold and delivered to this plaintiff, subject to the conditions hereinafter set out, three (3) Weld County, Colorado 6% Bonds (Greeley Poudre Irrigation District) amounting to $1,503.00, par value, for which this plaintiff agreed to, and did pay the defendant, Farson, Son & Company, the sum of $1,503.00.

Plaintiff further states that said sale was conditioned as follows, to-wit: That shortly before the said sale to the plaintiff, the
31 defendant, Farson Son & Company, had sold to one E. M. Drummond certain of the aforesaid bonds, for the purchase

price of which said Drummond had executed to the defendant his notes; it was agreed between the parties that the sale of said bonds to this Plaintiff and the said Drummond was conditioned that the said Drummond should visit the Greeley Poudre Irrigation District and examine the security for the bonds, and if said security was not satisfactory to the said Drummond, this plaintiff was to have the right to cancel the said sale, and the bonds returned to the defendant, Farson, Son & Company, and that the defendant would return to plaintiff the amount paid for said bonds, to-wit, the sum of $1,503.00, together with interest at the rate of 6% per annum from the date when plaintiff paid for said bonds until repaid by defendant Farson, Son & Company.

Plaintiff states that shortly thereafter, and before the said Drummond had had an opportunity to visit said Irrigation District, the said enterprise failed and defaulted in payment of interest on its said bonds, and that said Drummond thereupon notified the defendant, Farson, Son & Company, that said bonds and security were not satisfactory to him, and said defendant canceled said sale, received back said bonds and returned to said Drummond his notes. That at the same time Plaintiff notified the defendant, Farson, Son & Company, that said bonds and security were not satisfactory to the said Drummond and were consequently unsatisfactory to plaintiff. Plaintiff thereupon, under the terms of the said agreement and understanding, tendered and offered to return to defendant the bonds sold to plaintiff as aforesaid, and demanded from the defendant, the return of his money with interest from date of payment to said defendant. Said defendant did fail and refuse to receive back said bonds, and did fail and refuse to pay back to this plaintiff the amount aforesaid, or interest thereon, and still fails and refuses to pay back same or any part thereof, or interest thereon, although plaintiff has repeatedly tendered back said bonds and has always been ready and willing to return them to the said defendant. 32

Plaintiff states that the proposed visit of said Drummond to said Irrigation District was for the purpose of investigating the enterprise and the value and solvency of the securities for said bonds, and that said visit was rendered unnecessary by the failure of the enterprise, and the failure of the securities to be of any value or solvency whatsoever.

Plaintiff states that because of the failure of said condition the said agreement became canceled and of no binding effect upon him whatsoever, and that he is entitled to have said contract rescinded and be restored his original status.

Plaintiff therefore charges that he is entitled to recover from the defendant, Farson, Son & Company, the sum of $1,503.00 and legal interest from December 11, 1911.

Wherefore, by reason of the premises, plaintiff again tenders herein to defendant said bonds and delivers same into Court with this Petition, and prays judgment in the sum of $1,503.00 with interest thereon from December 11, 1911, at the rate of 6% per annum, for his costs herein expended, and for all proper relief.

J. S. LAURENT,
Counsel for Plaintiff.

33 Bernard Flexner makes oath that he is the plaintiff in the above styled action and that the statements contained therein are true.
BERNARD FLEXNER.

Subscribed and sworn to before me this 25th day of September, 1913.

My commission expires August 20, 1917.

WILLIAM K. OTIS,
Notary Public.

Said Three (3) Exhibits mentioned as being filed with the foregoing Petition, are Three (3) Gold Bonds with coupons attached, which cannot be copied, hence by request of attorneys in this case, are omitted from this record.

Thereupon the Clerk issued Summons and Three (3) Copies, which Summons is as follows to-wit:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

We Command you to Summons Farson, Son & Company, a partnership composed of John Farson, Jr., William Farson, and John A. McElroy, to answer a petition filed against them in our Jefferson Circuit Court, by Bernard Flexner, and warn them that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken
34 at petitioner's option; and make due return of this summons within sixty days from the date hereof.

Witness, Louis Summers, Clerk of said Court, this 27th day of September, 1913.

LOUIS SUMMERS, *Clerk,*
By GEO. P. BUTLER, *D. C.*

Said foregoing Summons is returned on the back by the Sheriff as follows to-wit:

Came to hand Sept. 29, 1913, at 12:40 P. M.

Executed Oct. 7/1913, on Farson, Son & Company, a partnership composed of John Farson, Jr., William Farson and John S. McElroy, by delivering a copy of each of the within summons to Washington Flexner, Agent for Farson, Son & Company.

A. M. EMLER, *S. J. C.,*
By J. KRAUSS, *D. S.*

At a Court held on the 8th day of November, 1913.

This action was set at rules by plaintiff on the 3rd inst.

Upon motion of plaintiff by counsel, it is ordered by the Court that this action be and it is submitted.

At a Court held on the 15th day of November, 1913.

This action was set at rules by plaintiff on the 10th inst.

35 Came plaintiff by counsel, and upon written motion filed, moved the Court to set aside the submission of this case.

Further came plaintiff by counsel, and upon written motion filed, moved the Court to transfer this *this* action to the Common Law Docket of this Court for trial.

Upon motion of plaintiff by counsel, it is ordered by the Court that the above mentioned motions be and are assigned to November 18th, 1913, for hearing.

Said written motion to set aside submission for judgment, filed on the 15th day of November, 1913, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

Bernard Flexner, Plaintiff,
vs.
Farson, Son & Company, Defendants.

Motion to Set Aside Submission for Judgment.

Plaintiff, Bernard Flexner, moves the Court to set aside the order of submission heretofore made herein on his motion for judgment against the defendants, and moves further that he be allowed to withdraw his motion for judgment against the defendants.

FLEXNER & GORDON,
J. S. LAURENT,
Counsel for Plaintiff.

36 Said written motion to transfer case to ordinary Docket, filed on the 15th day of November, 1913, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

Bernard Flexner, Plaintiff,
vs.
Farson, Son & Company, Defendants.

Motion to Transfer Case to Ordinary Docket.

Plaintiff, Bernard Flexner, moves the Court to transfer this action to the ordinary docket of the Court.

FLEXNER & GORDON,
J. S. LAURENT,
Attorney- for Plaintiff.

At a Court held on the 18th day of November, 1913.

This case coming on to be heard upon the motion of plaintiff to set aside the submission of this case, and further to transfer this action to the Common Law Docket, and the Court being advised, it is ordered by the Court that the motion to set aside the submission of this case, be and it is sustained.

Upon motion of plaintiff, it is ordered by the Court that the submission of this case be and the same is hereby set aside.

It is further ordered by the Court that the motion of plaintiff to transfer this action to the Common Law Docket of this
37 Court for trial, be and it is sustained.

Upon motion of plaintiff, is is ordered by the Court that this action be and it is transferred to the Common Law Docket of this Court.

It is further ordered by the court that an allotment be held, which resulted in the alloting of this action to the Common Pleas Branch,
resulted in the allot-ing of this action to the Common Pleas Branch,

It is therefore ordered by the Court that this action be and it is assigned to Common Pleas Branch, Third Division for trial.

At a Court held on the 13th day of December, 1913.

This action was set at rules by the plaintiff on the 8th inst.

Came plaintiff by counsel, and moved the Court on a written motion filed, for a judgment herein.

It is ordered by the Court that said motion be submitted.

Said written motion for judgment filed on the 13th day of December, 1913, is as follows to-wit:—

38 Jefferson Circuit Court, Common Pleas Branch, Second Division.

BERNARD FLEXNER, Plaintiff,

vs.

FARSON, SON & COMPANY, a Partnership Composed of John Farson, Jr., William Farson, and John A. McElroy, Defendants.

Motion for Judgment.

The plaintiff, Bernard Flexner, by counsel now moves the Court for Judgment herein in accordance with the prayer of his petition.

J. S. LAURENT,
Counsel for Plaintiff.

At a Court held on the 31st day of January, 1914.

The Court being advised, it is ordered that the plaintiff's motion for a judgment be sustained.

It is therefore adjudged by the Court that the plaintiff, Bernard Flexner, recover of the defendants, Farson, Son & Company, a partnership composed of John Farson, Jr., William Farson, and John A. McElroy, the sum of One Thousand Five hundred and Three ($1,503.00) Dollars, with interest thereon at the rate of six per cent per annum, from December 11th, 1911, until paid and his costs herein expended, for which he may have execution.

39 UNITED STATES OF AMERICA,
State of Kentucky,
Jefferson County, ss:

I, Louis Summers, Clerk of Jefferson Circuit Court, in and for the State and County aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, (with the exception of Three (3) Exhibits filed with the Petition, which cannot be copied into this record, and are omitted by request of counsel, see page 5 of this record, in the action wherein Bernard Flexner is Pltf. and Farson, Son & Company, &c. are Defts. #82650, as appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court aforesaid, at the City of Louisville, this 3rd day of Feb'y, 1914.

LOUIS SUMMERS, *Clerk.*

STATE OF KENTUCKY,
Jefferson County, ss:

I, W. M. Smith, Judge of the Jefferson Circuit Court, Common Pleas Branch, Fourth Division, in the State and County aforesaid, do certify that Louis Summers, who has signed the foregoing certificate is, and was at the time of same, Clerk, of said Court, duly elected and qualified, that all his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

Given under my hand, at the City of Louisville, this 3rd day of Feb'y, 1914.

W. M. SMITH, *Judge.*

STATE OF KENTUCKY,
Jefferson County, ss:

I, Louis Summers, Clerk of the Jefferson Circuit Court in the State and County aforesaid, do certify that W. M. Smith, who signed the foregoing certificate, is and was at the time of signing same, Judge of said Court, duly elected and qualified that all of his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

Given under my hand, at the city of Louisville, this 3rd day of Feb'y, 1914.

LOUIS SUMMERS, *Clerk.*

40 And afterwards to-wit, on the 30th day of June A. D. 1914 a certain Plea was filed in the office of the clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business, etc.

Pleas of William Farson to Amended Declaration.

I.

Now comes the defendant, William Farson, and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action against him the said defendant, by reason of anything in his said amended declaration pleaded and set forth because he says that before and on, to-wit, December 11, A. D. 1911, and continuously from thence hitherto, and before and at the time said alleged suit mentioned in said amended declaration was instituted in said Jefferson Circuit Court in and for said Jefferson County, State of Kentucky, he the said defendant was and still is a resident and citizen of the State of Illinois, and that during no portion of said period of time was he, the said defendant, a resi- 41 dent or citizen of the state of Kentucky; that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said defendant, within the territorial limits of the said State of Kentucky; that he, the said defendant, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court nor did he, the said defendant, at any time voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said defendant, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him, the said defendant, in said alleged suit and that said alleged judgment mentioned in said amended declaration was rendered without due process of law as guaranteed to him, the said defendant, by the Constitution of the United States, and that said judgment is not a valid and binding obligation against him, the said defendant, and this he, the said defendant is ready to verify, etc.

II.

And for a further plea in this behalf the said defendant, William Farson, comes and defends the wrong and injury, etc., and says that the plaintiff ought not to have his aforesaid action against him the said defendant, by reason of anything in his said amended declara-

tion pleaded and set forth because he says that said alleged judgment rendered in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said amended declaration, was a joint judgment against him the said defendant and the de-
42 fendants John Farson, Jr., and John A. McElroy; that before and on to-wit: December 11, A. D. 1911 and continuously from thence hitherto and before and at the time said alleged suit mentioned in said amended declaration and in which said judgment was rendered, was instituted in said Jefferson Circuit Court, he the said William Farson was and still is a resident and citizen of the *the* State of Illinois, and said John Farson Jr., and John A. McElroy were and still are residents and citizens of the State of New York, and that during no portion of said period of time was he the said William Farson, or said John Farson, Jr., or said John A. McElroy, or any or either of them, residents or citizens of the State of Kentucky; that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said William Farson, or upon said John Farson, Jr., or John A. McElroy, or any or either of them, within the territorial limits of said State of Kentucky; that he, the said William Farson, or John Farson, Jr., or John A. McElroy, or any or either of them, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said William Farson, or John Farson, Jr., or John A. McElroy, or any or either of them, at any time voluntarily submit his or their person or persons to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said William Farson, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him, the said William Farson, or of said John Farson, Jr., or of said John A. McElroy, or of any or either of them, in said alleged suit, and that said alleged judgment mentioned
43 in said amended declaration was rendered without due process of law as guaranteed to him, the said William Farson, by the Constitution of the United States, and that said Judgment is not a valid and binding obligation against him, the said William Farson, and this he, the said defendant, William Farson, is ready to verify, etc.

III.

And for a further pleas in this behalf, the defendant William Farson, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action against him the said defendant, by reason of anything in his amended declaration pleaded and set forth because he says that at the time said alleged suit mentioned in said amended declaration was instituted in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, and at the time of said alleged service of summons on said Washington Flexner in manner and form as the same is pleaded and set forth in said amended declaration and at the time said judgment was rendered in said Jefferson Circuit Court there was no law

in force in the State of Kentucky under and by virtue of which service of summons in manner and form as alleged and set forth in said amended declaration to have been had and made in said suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, could be obtained and a judgment in personam rendered against citizens or residents of said State of Kentucky, and he, the said defendant, alleges that in said proceedings had in said Jefferson Circuit Court he, the said defendant, was denied equal privileges and immunities with the citizens and residents of said State of
44 Kentucky guaranteed to him, the said defendant, by the Constitution of the United States, wherefore he, the said defendant, alleges that said subsection 6, section 51 of said Kentucky Civil Code mentioned in said amended declaration, and by virtue of which said service of summons was had, is unconstitutional and void, and he, the said defendant, further alleges that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said defendant, within the territorial limits of said State of Kentucky; that he, the said defendant, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said defendant, at any time voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said defendant, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him, the said defendant in said alleged suit, and that said alleged judgment mentioned in said amended declaration is not a valid and binding obligation against him, the said defendant, and this he the said defendant, is ready to verify, etc.

IV.

And for a further plea in this behalf the defendant, William Farson comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action against
45 him, the said defendant, by reason of anything in said amended declaration pleaded and set forth because he says that at the time of the commencement of this suit he, the said defendant, William Farson, and the said defendant, John Farson, Jr., and John A. McElroy, were not doing business as partners under the name and style of Farson, Son & Company, nor has he, the said William Farson, and the defendants, John Farson, Jr., and John A. McElroy, at any time since the commencement of this suit, engaged in business as partners under the name and style of Farson, Son & Company, and this he, the said defendant, William Farson, is ready to verify, etc.

V.

And for a further plea in this behalf the defendant, William Farson, comes and defends the wrong and injury, when, etc. and say that the plaintiff ought not to have his aforesaid action against him, the said defendant, William Farson, by reason of anything in said amended declaration pleaded and set forth because he says that at the time of the commencement of said suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said amended declaration, and for a long time prior thereto and at the time of said alleged service of summons on said Washington Flexner in manner and form as the same is pleaded and set forth in said amended declaration, and at the time of the alleged entry of said judgment, he, the said defendant, William Farson, and the said defendants, John Farson, Jr.. and John A. McElroy, were not doing business as partners under the name and style of Farson, Son & Company, and this he, the said defendant, William Farson, is ready to verify, etc.

46

VI.

And for a further plea in this behalf the said defendant, William Farson, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in said amended declaration pleaded and set forth because he says that at the time of the commencement of said alleged suit in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, mentioned in said amended declaration, and at the time of said alleged service of summons upon said Washington Flexner in manner and form as the same is alleged and set forth in said amended declaration, the said William Flexner was not then, nor had he been for a long time prior thereto, nor has he been at any time subsequent thereto; and agent of, manager for or person in charge of the business of said defendant, William Farson, in the State of Kentucky or elsewhere, nor was he the said Washington Flexner, during any of said time the agent of, manager for or person in charge of the business of the firm of Farson, Son & Company, or any of the members of said firm in said State of Kentucky or elsewhere, wherefore he, the said defendant, William Farson, alleges that said alleged service of summons in said suit in said Jefferson Circuit Court pleaded and set forth in said amended declaration was void, and he, the said defendant, William Farson, alleges that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time personally served upon him, the said defendant, William Farson, or any or either of the defendants in said suit mentioned
47 said amended declaration within the territorial limits of said
State of Kentucky, and that he, the said defendant, William Farson, or any or either of the other defendants in said suit mentioned in said amended declaration did not at any time appear personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said defendant, William Farson, or any or either of the other defendants in said suit mentioned in said amended declaration, at any time voluntarily submit him or their person or persons to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore he, the said defendant, William Farson, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of him, the

said defendant William Farson, or of any or either of the defendants in said suit mentioned in said amended declaration, and that said alleged judgment mentioned in said amended declaration is not a valid and binding obligation against him, the said defendant, William Farson, and this he, the said defendant, William Farson, is ready to verify, etc.

VII.

And for a further plea in this behalf, the defendant, William Farson, comes and defends the wrong and injury when etc., and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, William Farson, by reason of anything in said amended declaration pleaded and set forth because he says that this suit is brought upon an alleged joint judgment rendered in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, against him, the said defendant, William Farson, and the defendants, John Farson, Jr., and John A. McElroy; that at the time of the commencement of said alleged suit in said
48 Jefferson Circuit Court in and for Jefferson County, State of Kentucky,
mentioned in said amended declaration, and for a long time prior thereto and continuously from thence hitherto, said John A. McElroy was not, and is not, a member of the firm of Farson, Son & Company, and that at no time since long prior to the commencement of said suit in said Jefferson Circuit Court mentioned in said amended declaration up to the present time was said Washington Flexner an agent of, manager for or person in charge of the business of said John A. McElroy in said State of Kentucky or elsewhere, and that said alleged service of summons on said Washington Flexner in manner and form as the same is pleaded and set forth in said amended declaration was not, and is not a valid and legal service of summons on said John A. McElroy by virtue of said subsection 6 section 51 of the Kentucky Civil Code mentioned in said amended declaration or otherwise; that no summons or other process issuing out of said Jefferson Circuit Court in said suit was at any time served upon said John A. McElroy within the territorial limits of said State of Kentucky or elsewhere; that he, the said John A. McElroy, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said John A. McElroy voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit, wherefore the said defendant William Farson, alleges that said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, did not acquire jurisdiction of said John A. McElroy in said alleged suit, and that said alleged judgment mentioned in said amended declaration was not and is not a valid and binding judgment
49 or obligation against him, the said John A. McElroy, and
he the said defendant, William Farson, alleges that by reason of the premises said judgment was not, and is not, a valid and binding obligation against him, the said William Farson, and this he, the said defendant, William Farson, is ready to verify, etc.

VIII.

And for a further pleas in this behalf, the said defendant, William Farson, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action against him, the said defendant, by reason of anything in his said amended declaration pleaded and set forth because he says that before and on, to-wit, December, 11 A. D. 1911, and continuously from thence hitherto and before and at the time said alleged suit mentioned in said amended declaration was instituted in said Jefferson Circuit Court in and for Jefferson County, State of Kentucky, he the said defendant, was and still is a resident and citizen of the State of Illinois and that during no portion of said period of time was he, the said defendant, a resident or citizen of the State of Kentucky; that during all and every portion of said period of time there were in full force and effect in said State of Kentucky the following provisions of the Civil Code of said state, to-wit:

50 Section 48. "Unless otherwise provided, the summons shall be served by delivering, or if acceptance be refused by offering to deliver a copy of it to the person to be summoned."

Section 56. "Excepting infants (under the age of fourteen years)—other than married women—and persons of unsound mind and prisoners, if a defendant be out of this state the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served on him; and may cause, a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated. The officer before whom the affidavit is made shall certify that the affiant is personally known by him to be worthy of credit."

Section 57. "If the defendant be—

1. A corporation having no agent in this state, known to the plaintiff, upon whom a summons can be lawfully served or;

2. A non-resident of this state and believed to be absent therefrom; or,

3. Have departed therefrom with intent to delay or defraud his creditors; or,

4. Have been absent therefrom four months; or,

5. Have left the country of his residence to avoid the service of summons; or,

6. So conceal himself that a summons can not be served upon him; or,

7. If his name and place of residence be unknown to the plaintiff, the clerk shall, subject to the provisions of section fifty-eight, make upon the petition an order warning the defendant, to defend the action on the first day of the next term of the court, which does not commence within sixty days after the making of the order."

Section 60. "A defendant against whom a warning order is made for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly."

Section 61. "The plaintiff may, at any time before judgment, have a summons served on the defendant if found in this state, although a warning order may have been previously entered against him; and after such service the case shall proceed as in other cases of actual service."

Section 75. "Excepting the actions mentioned in section sixty-two or sixty-seven, both inclusive, and in sections seventy and section seventy-six an action against a defendant who may be proceeded against by a warning order, as is authorized by section fifty-seven
must be brought in a county in which the defendant resides
51 at the commencement of the action; or in which he has property; or in which a person resided against whom he has a valid claim for money or property."

Section 78. "An action which is not required by the foregoing sections of this article to be brought in some other county may be brought in any county in which the defendant or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned."

Section 80. "In an action brought pursuant to section seventy-eight, against several defendants, no judgment shall be rendered against any of them, upon the service of a summons out of the county in which the action is brought, if no one of them be summoned in that county, nor resided therein when the action was commenced; nor if the action be discontinued or dismissed as to the defendant who resided, or was summoned, in that county; nor if judgment be rendered in his favor, unless a defendant summoned out of that county make defense without objecting to the jurisdiction of the court; Provided, That a judgment for a defendant, who resided or was summoned in that county, upon a plea of his discharge as a bankrupt, shall not prevent a judgment against any other defendant, in an action brought before the commencement of the proceedings in which the discharge was obtained; but, after such judgment upon a plea of discharge in bankruptcy, a defendant not summoned in the county, nor residing therein at the commencement of the action, may, by answer, deny the liability of such bankrupt. The issue as to the original liability of such bankrupt shall be tried as if he were still a party, and the plaintiff shall not have judgment against the defendant not summoned nor residing in the county, unless it be decided that the bankrupt was originally liable."

Section 419. "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this state as provided in section fifty-six, and who has not appeared in the action."

Said defendant further alleges that during all of said period of time hereinbefore mentioned there was no other law in force in said State of Kentucky providing for any other method of service of summons in suits at law similar to said suit in said Jefferson Circuit

Court, mentioned in said amended declaration, upon citizens and residents of said State of Kentucky transacting business as individuals or as partners in said state, and who were not infants under the age of fourteen years, or persons of unsound mind, or prisoners, or members of a community of Shakers.

52 Said defendant further alleges that no summons or other process issuing out of said Jefferson Circuit Court in said suit was, at any time, personally served upon him the said defendant, within the territorial limits of said state of Kentucky or elsewhere; nor was a copy of any such summons, at any time, delivered to him, the said defendant, nor was delivery of a copy of any such summons, at any time, offered to him, the said defendant, within the territorial limits of said State of Kentucky; and that he, the said defendant, at no time appeared personally or by attorney in said alleged suit in said Jefferson Circuit Court, nor did he, the said defendant, at any time, voluntarily submit his person to the jurisdiction of said Jefferson Circuit Court in said alleged suit.

And said defendant alleges that by reason of the premises, said subsection 6 of section 51 of said Kentucky Civil Code is unconstitutional and void; that it is an unlawful discrimination between citizens and residents of said State of Kentucky and citizens and residents of the State of Illinois and other states of the United States; that said Judgment in said Jefferson Circuit Court mentioned in said amended declaration was obtained without due process of law as guaranteed to said defendant by the Constitution of the United States; that the entry of said judgment in said Jefferson Circuit Court as a judgment in personam against said defendant was an attempt to deprive him, the said defendant, of the equal privileges and immunities with residents and citizens of said State of Kentucky guaranteed to him, the said defendant, by the Constitution of the United States; that said Jefferson Circuit Court in and for the county of Jefferson, State of Kentucky, was without jurisdiction of him, 53 the said defendant, in said alleged suit, and that said alleged judgment mentioned in said amended declaration was and is unlawful and void and is not a valid and binding obligation against him, the said defendant, and this he, the said defendant, is ready to verify, etc.

BUSBY, WEBER, MILLER & ROBINSON,
Attorneys for Defendant.

And afterwards to-wit, on the 27th day of November, A. D. 1914, a certain Demurrer was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER

vs.

JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. McELROY, Doing Business, etc.

Demurrer of Plaintiff to Pleas of Defendant William Farson to Amended Declaration.

Now comes the plaintiff, by R. D. Stevenson and J. S. Laurent, his attorney-, and says that said pleas, and each of them, and the matter therein contained, in manner and in form as the same are
54 set forth, are not sufficient in law for said defendant to maintain his aforesaid defence, and that the said plaintiff is not bound by law to answer the same, and this he is ready to verify.

Wherefore, for want of a sufficient plea in this behalf the plaintiff prays judgment.

R. D. STEVENSON,
J. S. LAURENT,
Attorneys for Plaintiff.

STATE OF ILLINOIS,
County of Cook, ss:

R. D. Stevenson, on- of the attorneys for the plaintiff in the above entitled cause, on oath states that the foregoing demurrer to the pleas of defendant to the amended declaration in said cause is not interposed for the purpose of delaying said suit or any proceedings therein, and certifies that the foregoing demurrer of the plaintiff to said pleas is well founded in law and properly filed in said cause.

—— ——.

Subscribed and sworn to before me this — day of November, 1914.

—— ——,
Notary Public.

55 And afterwards, to-wit on the 31st day of December, A. D. 1914, the Following proceedings were had and entered of record in said Court to-wit:

December 31, 1914.

B. 1392.

BERNARD FLEXNER

vs.

JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Farson, Son & Company.

This cause coming on to be heard upon the demurrers heretofore filed herein by the plaintiff to the pleas heretofore filed in this cause by the defendants after arguments of counsel and due deliberation by the court it is ordered that said demurrers be and they are hereby overruled.

It is further ordered that the plaintiff be and he is hereby required to answer herein within twenty days from this date.

And afterwards to-wit, on the 19th day of January, A. D. 1915, a certain Stipulation was filed in the office of the Clerk of said Court, in words and figures following to-wit:

56 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

BERNARD FLEXNER

vs.

JOHN FARSON, JR., et al.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, through their respective attorneys, that the time in which the plaintiff shall reply to the pleas of defendant to the amended declaration in the above cause, or in which to appeal from the order entered therein on December 31, 1914, may be extended for twenty days from January 20, 1915.

J. S. LAURENT,
RALPH D. STEVENSON,
Attorneys for Plaintiff.
BUSBY, WEBER, MILLER & ROBINSON,
Attorneys for Defendant.

And thereupon on the same day, to-wit on the 19th day of January A. D. 1915 the following proceedings were had and entered of record in said court, to-wit:

57 January 19, 1915.

B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. McELROY,
Doing Business as Farson, Son & Company.

On the stipulation of the parties to this suit filed herein it is ordered that the time within which the plaintiff is to reply to the defendant's plea to the amended declaration be and the same is hereby extended twenty days from January 20, 1915.

And afterwards to-wit on the 9th day of February A. D. 1915 the following proceedings were had and entered of record in said Court to-wit:

February 9, 1915.

B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. McELROY,
Doing Business as Farson, Son & Company.

On motion of attorney for plaintiff it is ordered that the time within which the plaintiff is to reply to the defendants' plea be and the same is hereby extended five days from and after the expiration of the time heretofore allowed.

58 And afterwards to-wit, on the 13th day of February A. D. 1915 a certain Second Amended Declaration was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. McELROY,
Doing Business as Partners under the Name and Style of Farson, Son & Company.

Second Amended Declaration.

Now comes the plaintiff, by his attorneys and files this, his second amended declaration, and complains of John Farson, Jr., William

Farson, and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, in a plea of debt.

For that whereas the plaintiff heretofore on, to-wit, the 31st day of January, in the year 1914, in the Jefferson Circuit Court in and for Jefferson County, State of Kentucky, the same being a court of general jurisdiction duly created and organized under the laws of said State, by the judgment of said court recovered a judgment against said defendants in a certain action pending before said court, in which the plaintiff herein was plaintiff and the
59 defendants herein were defendants, for the sum of One Thousand Five Hundred and Three Dollars ($1,503), with interest thereon at the rate of six per cent (6%) per annum from December 11, 1911, until paid, and his costs in said suit expended, as more fully appears from the record thereof remaining in said court;

That said action and the said judgment therein recovered were based upon and grew out of a certain transaction involving the sale by said defendants to the plaintiff, of certain bonds on or about the 11th day of December, 1911; and that said transaction occur-ed within the City of Louisville, Jefferson County and State of Kentucky, and that the cause of action on which said judgment was and is based *occur*red in said Jefferson County, in the State of Kentucky, all of which more fully appear from the record of said action and judgment remaining in said Circuit Court in and for Jefferson County, Kentucky.

That on said last mentioned date, to-wit, December 11, 1911, and for a long time prior thereto, said defendants were a partnership composed of John Farson, Jr., William Farson and John A. McElroy, doing business under the firm name of Farson, Son & Company, and were non-residents of the State of Kentucky, and were engaged in said City of Louisville, Jefferson County and State of Kentucky, in the business of buying and selling bonds; and that on said date and for a long time prior thereto, *on* Washington Flexner was the manager and agent and person in charge, in said City and County, of said business so carried on by said defendants in the State of Kentucky, and conducted on behalf of said
60 partnership, the said transaction hereinabove referred to;

That since said date and at the time of the institution of the said action and at the time of the service of the process therein on said defendants, said defendants, and each of them continued to be, were, and now are non-residents of the State of Kentucky, and neither had nor have any officer, manager, agent, or person in charge of their business, within the State of Kentucky, other than the said Washington Flexner; and that under the laws of said State, the said Washington Flexner continued from said December 11, 1911, until the institution of the said suit in Jefferson County, to be the agent of the defendants on whom process could be served in suits or proceedings arising out of said transaction;

That at said last above mentioned date, to-wit, December 11, 1911, and for a long time prior thereto, and at the date on which said suit was instituted, to-wit, September 27, 1913, and at the date on which said judgment was rendered, to-wit, January 31, 1914, and at all times intervening between said dates, there was and is now in full force and effect throughout the State of Kentucky a certain statutory provision known as Sub-section 6 of Section 51 of the Kentucky Civil Code, which Provision was and is substantially as follows:

61 "In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of such business in this state, in the county where the business is carried on, or in the county where the cause of action *occured*."

That the summons of said Jefferson Circuit Court, issued in said cause and directed to said defendants and each of them, was duly executed and served on said Washington Flexner, in person, in said Jefferson County, as agent of said defendants, in accordance with and as provided by said statute and the practice of said court; and that thereby the said court duly secured jurisdiction of said defendants; and that said judgment is entitled, within the state of Illinois, to full faith and credit under and by virtue of the provisions of Section 1 of Article 4 of the Constitution of the United States;

That said judgment still remains in full force and effect, yet the said defendants, nor either of them, have not paid to the plaintiff the said sum of money by him recovered, amounting to the sum of One Thousand Five Hundred and Three Dollars ($1,503) with interest thereon at the rate of six per cent (6%) per annum from December 11, 1911, until paid, and the costs of said plaintiff therein expended, but refuses so to do, to the damage of plaintiff in the sum of Two Thousand Dollars ($2,000), and therefore he brings this suit.

BERNARD FLEXNER,
By J. S. LAURENT,
By RALPH D. STEVENSON,
His Attorneys.

62 And thereupon on the same day, to-wit, on the 13th day of February A. D. 1915 the following proceedings were had and entered of record in said court, to-wit:

February 13, 1915.

B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY,
Doing Business as Farson, Son & Company.

On motion of attorney for plaintiff it is ordered that leave be and the same is hereby given the plaintiff to file instanter a second amended declaration herein.

It is further ordered that the pleas of the defendant now on file to the amended declaration be and they are hereby extended to the second amended declaration.

It is further ordered that the Plaintiff's demurrer to said pleas of the defendant to the amended declaration be and it is hereby extended to the pleas to the second amended declaration and after arguments of counsel and due deliberation by the court it is ordered that said plaintiff's demurrer be and it is hereby overruled.

Whereupon plaintiff elects to stand by his demurrer.

Therefore it is considered by the court that the plaintiff take nothing by his aforesaid action and that the defendants go hence without day and do have and recover of and from the plaintiff their costs and charges in this behalf expended and have execution therefor.

Whereupon plaintiff having entered his exceptions herein prays an appeal from the judgment of this court to the Supreme Court of the State of Illinois which appeal is allowed upon the plaintiff filing herein his appeal bond in the penal sum of two hundred dol-
lars within thirty days from this date said bond to be ap-
63 proved by the Clerk of this court and thirty days' time from
this date is allowed the plaintiff within which to file his
bill of exceptions herein.

And afterwards to-wit on the 9th (Ninth) say of March A. D. 1915, a certain Bill of Exceptions was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company.

Bill of Exceptions.

Be it remembered that on the 13th day of February, 1915, beginning at 10 o'clock in the forenoon, the following proceedings were had in the above entitled cause, in the Circuit Court of Cook County, before Honorable Benjamin W. Pope, Judge:

Appearances:

Ralph D. Stevenson, representing J. S. Laurent and Ralph D. Stevenson on behalf of plaintiff.

Geo. W. Miller, representing Busby, Weber, Miller and Robinson and Alfred W. Craven on behalf of defendants.

64 The plaintiff, by its Counsel, thereupon by motion duly made and entered, asked leave to file instanter in said proceeding a second amended declaration.

Thereupon, the court, by an order duly entered in said cause, granted permission to plaintiff to file such second amended declaration.

Thereupon, plaintiff duly filed in said cause a second amended declaration.

Thereupon, upon motion duly made on behalf of defendants, by an order entered in said cause, the court ordered that the pleas filed on behalf of defendants to the amended declaration in said proceeding be extended and stand as the pleas of defendants to the second amended declaration.

Thereupon, upon motion of plaintiff, the court ordered that the demurrer theretofore filed by plaintiff in said cause to defendants' pleas to the amended declaration in said cause be extended and stand as the demurrer of the plaintiff to defendants' pleas, as aforesaid, to the second amended declaration filed in said cause.

Thereupon plaintiff, by his counsel, called up for disposition plaintiff's demurrer to defendants' pleas to said second amended declaration, and thereupon the court after hearing arguments of counsel (in which argument it was urged, among other grounds, on behalf of defendants that a certain statute of Kentucky involved in said action was in contravention of the constitution of the United States of America), by order duly entered in said cause, overruled said demurrer, to which action of the court plaintiff, by his counsel, then and there duly excepted.

65 Thereupon, plaintiff elected to stand by his said demurrer and the court thereupon entered judgment in said cause in favor of defendants, and ordered, adjudged and decreed that the plaintiff take nothing by his action and the defendants have and recover of the plaintiff the costs of said suit to which judgment of the court the plaintiff, by his counsel, then and there duly excepted.

Thereupon, the plaintiff prayed an appeal to the Supreme Court of Illinois, which appeal was granted upon condition that an appeal bond in the sum of Two Hundred Dollars ($200), with surety to be approved by the Clerk of said court, be filed in said cause on or before the expiration of thirty (30) days; and the court further ordered that the plaintiff might have thirty (30) days in which to file a bill of exceptions in said cause.

Which proceedings were all the proceedings taken in said cause on said day.

For that, in order that the foregoing proceedings may fully appear of record, this Bill of Exceptions is tendered, signed and sealed this 9th day of March, 1915.

BENJAMIN W. POPE, *Judge.*

O. K. as to form.

BUSBY, WEBER, MILLER & ROBINSON,
Att'ys for Def'ts.

And thereupon on the same day, to-wit, on the ninth (9th) day of March A. D. 1915, a certain Appeal Bond was filed in the office of the Clerk of said Court, in words and figures following to-wit:

66 Know all men by these presents; that we Bernard Flexner, as principal, and The Ætna Accident and Liability Company, as surety, of the County of Cook and State of Illinois, are held and firmly bound unto John Farson, Jr., William Farson and John A. McElroy, doing business as Farson, Son & Co., also of the same County and State, in the penal sum of Two Hundred and no/100 ($200.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals, this 2nd day of March A. D. 1915.

The condition of the above obligation is such, that whereas, the said John Farson, Jr., Wm. Farson and John A. McElroy, doing business as Farson, Son & Co., did, on the 13th day of February, A. D. 1915, in the Circuit Court of Cook County, in the State aforesaid, and of the February Term thereof, A. D. 1915, recover a judgment against the above bounden Bernard Flexner, for the costs of suit; from which said judgment of the said Circuit Court of Cook County, the said Bernard Flexner has prayed for and obtained an appeal to the Supreme Court of said State;

Now, therefore, if the said Bernard Flexner shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment costs; interest, and damages rendered, and to be rendered, against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

BERNARD FLEXNER. [SEAL.]
THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
By CHARLES E. BENNETT,
Attorney in Fact. [SEAL.]

Approved:
JOHN W. RAINEY, *Clerk.*

O. K.
BUSBY, WEBER, MILLER & ROBINSON,
Att'y- for Defendants.

67 And thereupon the same day, to-wit, on the Ninth (9th) day of March A. D. 1915, a certain Notice & Præcipe was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business, etc.

To Messrs. Busby, Weber, Miller and Robinson and Alfred W. Craven, Attorneys for Defendants:

Please take notice that on Tuesday, March 9, 1915, at 10 o'clock A. M. or shortly thereafter, we shall sue out of the office of the Clerk of the Circuit Court of Cook County, a præcipe for a transcript of the record of proceedings in the above cause, which præcipe is attached hereto.

Yours, etc.,

J. S. LAURENT,
RALPH D. STEVENSON,
Attorneys for Plaintiff.

Received a copy of the above notice and attached præcipe this 3rd day of March, 1915.

BUSBY, WEBER, MILLER & ROBINSON,
Attorneys for Defendants.

68 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B. 1392.

BERNARD FLEXNER
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business, etc.

To the Clerk of the Circuit Court of Cook County:

Please prepare an authenticated transcript of the record of all proceedings had in the above cause, to be filed in the Supreme Court of the State of Illinois, in connection with the appeal of plaintiff in said cause, and incorporate therein copies of the following:

1. Præcipe and summons issued in said cause showing service of process.
2. All pleading filed in said cause.
3. All orders entered in said cause.
4. Judgment .
5. Bill of Exceptions.
6. Appeal Bond.
7. Any and all other papers, orders, or proceedings filed or taken in said cause, except formal notices of motions.

J. S. LAURENT,
RALPH D. STEVENSON,
Attorneys for Plaintiff.

69 STATE OF ILLINOIS,
County of Cook, ss:

I, John W. Rainey, Clerk of the Circuit Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete Transcript of the Record according to a certain Præcipe filed herein on March 9, A. D. 1915, in a certain cause lately pending in said Court, on the Law side thereof, between Bernard Flexner, Plaintiff and John Farson Jr., et al., Defendants.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County, this 9th day of March 1915.

[SEAL.] JOHN W. RAINEY, *Clerk.*

70 In the Supreme Court of Illinois.

BERNARD FLEXNER, Appellant,
vs.
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company, Appellees.

Assignment of Errors.

Now comes Bernard Flexner, appellant in the above cause, by J. S. Laurent and Ralph D. Stevenson, his attorneys, and shows to the court that in the proceedings lately had in said cause in the Circuit Court of Cook County, manifest errors intervened to the prejudice of the appellant, and the appellant assigns to such errors the following:

1. The court erred in overruling plaintiff's demurrer to defendant's pleas and each of them to the Plaintiff's second amended declaration.
2. The court erred in entering judgment in said cause against plaintiff and in favor of defendant.
3. The said judgment of said court is contrary to the law.
4. The said court, by its said judgment, failed to give full faith and credit to the record and judgment of the Jefferson Circuit Court of Jefferson County, Kentucky, contrary to the Constitution of the United States of America.

5. The said court, by its said judgment, erroneously found subsection 6 of section 51 of the Civil Code of Kentucky to be in violation of the Constitution of the United States of America.

6. The said court erroneously decided and held that the Jefferson Circuit Court of Jefferson County, Kentucky, did not have jurisdiction of the defendants in the action in which the judgment sued on was rendered.

By reason of the above errors the appellant, Bernard Flexner, prays that the judgment entered in said cause may be reversed.

J. S. LAURENT,
RALPH D. STEVENSON,
Attorneys for Appellant.

70½ And afterwards to-wit, on the Twenty-first day of April, 1915, the same being one of the days of the said April term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 10090.

BERNARD FLEXNER, Appellant,
vs.
JOHN FARSON, JR., et al., Appellees.

Appeal Circuit Court Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

71 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield, on Tuesday, the First Day of June, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, within and for the State of Illinois.

Present: Chief Justice William M. Farmer; Justice James H. Cartwright, Justice Orrin N. Carter, Justice Frank K. Dunn, Justice

George A. Cooke, Justice Charles C. Craig, Justice Warren W. Duncan; Patrick J. Lucy, Attorney General; Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that afterward, to-wit: on the 24th day of June, 1915, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 10090.

Bernard Flexner, Appellant,
v.
John Farson, Jr., et al.

Appeal from Circuit Court Cook.

72 April Term, 1915.

Docket No. 10090; Agenda 61.

Bernard Flexner, Appellant,
vs.
John Farson, Jr., et al.; William Farson, Appellee.

Appeal from the Circuit Court of Cook County.

Opinion by Carter, *J.:*

This was an action of debt brought by appellant, Bernard Flexner, in the Circuit Court of Cook County, on a judgment rendered by the Circuit Court of Jefferson County, Kentucky against Farson, Son & Co., and in favor of appellant. Service was had upon appellee, William Farson, only, the other members of the partnership not being found. To the amended declaration, containing one count, William Farson filed eight pleas. Appellant filed a general demurrer to these pleas which was overruled by the Court and judgment of nil capiat and costs to the appellee was entered, appellant electing to stand by his demurrer. From that judgment this appeal was taken direct to this Court on the ground that federal constitutional questions were involved.

In the original suit brought in the Kentucky court the service upon appellee was only by serving the alleged agent of Farson Son & Co., Washington Flexner. The Kentucky Circuit Court held such service good under Section 51 of the Civil Code of that State, which reads in part:

"In actions against an individual residing in another state, or a partnership, association or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

The first and principal question argued in the briefs is whether
service on an agent of a partnership under this section — the
73 Kentucky Civil Code violates the United States Constitution
as to due process of law. The several states of the Union are not in every sense independent; as many of the rights and powers which originally belonged to them are now vested in the federal government under the Constitution but they possess and exercise the authority of independent states, except in so far as limited by that constitution. Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory, but no state can exercise direct jurisdiction and authority over persons and property without its territory. To render the jurisdiction of any state court effectual in any case, it is necessary that the thing in controversy, or the parties interested, be subjected to the process of the court. "Certain cases are said to proceed in rem because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. * * * Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered." (Cooley's Constitutional Limitations, 6th ed. p. 496, 499; see, also 2 Black on Judgments, sec. 906; 2 Freeman on Judgments, 4th ed. secs. 564 to 567; Beaver v. Boggs, 38 Md. 255; L. & N. R. R. Co. v. Nash, 118 Ala. 477; Brooks v. Dun, 51 Fed. Rep. 138.) In some of the early federal cases, before the passage of the fourteenth amendment, under the provision of the constitution requiring that "full faith
and credit shall be given, in each state, to the public acts,
74 records and judicial proceedings of every other state," it was
assumed that by the act of Congress such records and proceedings when properly authenticated—would be entitled to such faith and credit within every court as they had by law or usage in the courts of the state in which entered. But the United States Supreme Court has now held that this provision of the Federal Constitution, construed in connection with said act of Congress, shall only be applicable "when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject matter. (Pennoyer v. Neff, 95 U. S. 714, 729.) In this last case it was held that a personal judgment was without validity if it was rendered by a state court against a non-resident of the state who was served by publication and no personal service in the state was made and he did not appear; that a state having within her territory property of a non-

resident may hold it to satisfy claims of her citizens against him; that her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property, but if he has no property in the State, there is nothing upon which her tribunals can adjudicate. It was further held in that case that substituted service by publication, or in any other authorized form, is sufficient to inform a non-resident of the object of proceedings taken, where property is once brought under the control of the court, by seizure or some equivalent act, but where suit is brought to determine the rights and obligations of the person, that is, where the suit is merely in personam, such constructive service is ineffectual for any purpose.

Counsel for appellant concede this to be the general rule, and state that they do not claim that a judgment rendered with-
75 out either personal service, or process upon the defendant
within the jurisdiction, or entry of appearance by attorney or otherwise, would be valid, unless the defendant may be considered to have assented to some other mode of service. They argue, however, that by doing business in Kentucky at the time said section 51 above quoted was in force, appellee and his partners impliedly assented and agreed that in suits growing out of such business process might be served upon them under and in accordance with the provisions of said statute, relying to uphold this contention very largely upon the following statement in the opinion in Pennoyer v. Neff, supra, (p. 735): "Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State." This statement was entirely unnecessary to the decision of the question involved in that case, for the opinion concludes: "In the present case, there is no feature of this kind, and consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise." Obviously, the court considered what was said on this point as mere dictum. The precise question here involved has never been before the United States Supreme Court for decision. The reasoning in the case just referred to as well as in D'Arcy v. Ketchum, 52 U. S. 165; Webster vs. Reid, 11 How. 437; Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287; Freeman v. Alderson, 119 U. S. 185; Wilson v. Seligman, 144 U. S. 41
76 and Scott v. McNeal, 154 U. S. 34 does not seem to be in
accord with the contention of counsel for appellant. The decisions on the question of the right of a foreign corporation to go into a state to do business are not in point on this question as such a corporation may go into any state only as a matter of grace, and

for that reason must submit to whatever conditions the State sees fit to impose.

This question as to this very statute has been passed upon by two courts and the act held unconstitutional. (Cabanne v. Graf, 92 N. Y. Rep. (Minn.) 461; Moredock v. Kirby, 118 Fed. Rep. 180.) It was held in both of these cases that it could not be implied from the fact that a person did business in the State that he consented to submit himself to the jurisdiction of the Courts, in a personal action, by service of process upon his agent; that by doing business in the State he submitted his property which he sent into the State to the jurisdiction of its courts, but did not submit his person. A similar statute was held unconstitutional by the courts of Delaware in Caldwell v. Armour, 43 Atl. Rep. 517. Counsel for appellant insist that this statute has been held constitutional by the highest state court of Kentucky in Guenther v. American Steel Hoop Co. 116 Ky. 580 and Johnson v. Westerfield's Admr. 143 Ky. 10. It is true that this statute was upheld in those decisions, but it was distinctly stated in the first case, (p. 587) that "the judgment complained of was not rendered on constructive service of process, nor is the question now raised as to what effect should be given the judgment beyond the confines of this State, where the statute authorizing the mode of service which was followed is without force," plaintly indicating that the court was not certain that the statute would be held constitutional in other jurisdictions.

77 Counsel for appellant argue in this connection that the Supreme Court of the United States held in the recent case of Ballard v. Hunter, 204 U. S. 241, that personal service upon non-residents was not always within the state's power, its process being limited by its boundaries and that a constructive service, at times, was a necessary resource; that the fundamental requirement as to "due process of law" in such matters was an opportunity for hearing and defense. What was said in that case must be considered in the light of the question there under consideration; it was a proceeding in rem with reference to the right of a state to levy taxes on property within its jurisdiction. Under all the authorities, in such a proceeding a constructive notice to the owner does not violate any constitutional provision. If the argument of counsel for appellant be followed to its logical conclusion on this point we cannot see any escape from the view that constructive notice if actually received by the individual would be as binding as personal service in any case. A non-resident person, unlike a corporation, does business in any state of the Union, not by virtue of the consent of that State, but under the Federal Constitution. His property which he sends into the State he submits to the jurisdiction of its courts, but not his person. We do not see how it can be presumed that his right to do business in that state would be waived because of a statute like the one in question, where there was no necessity cr consideration for his so doing.

If the statute is unconstitutional as to an individual it cannot be held constitutional as to a partnership. The theory that a partnership is a legal entity—distinct and separate from the persons composing it—is not recognized by the laws of this State. (Abbott v. Anderson, 265 Ill. 285. Neither is it by the United States Courts, (Francis v. McNeal, 228 U. S. 695.)

78 This question has been ably and exhaustively presented by the briefs of counsel. While we have not in this opinion referred particularly to all the authorities cited, we have given them each consideration. There may be some expressions in some decisions that tend to uphold the contention of counsel for appellant, but we think under the reasoning of the Federal decisions and by the weight of authority in other jurisdictions, the statute in question, so far as it applies to personal service upon individuals or partnerships in this State, must be held unconstitutional. This conclusion renders it unnecessary to consider the other questions argued in the briefs.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

79 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield, on Tuesday, the First Day of June, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, within and for the State of Illinois.

Present: Chief Justice William M. Farmer, Justice James H. Cartwright, Justice Orrin N. Carter, Justice Frank K. Dunn, Justice George A. Cooke, Justice Charles C. Craig, Justice Warren W. Duncan; Patrick J. Lucey, Attorney General; Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that to-wit:—on the 24th day of June, A. D. 1915, the same being one of the days of the said June term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 10090.

BERNARD FLEXNER, Appellant,

vs.

JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company, Appellees.

June 24th, A. D. 1915. Appeal from Circuit Court Cook.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellees recover of and from the said Appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

79½ *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Bernard Flexner, Plaintiff in Error, vs. John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson Son & Company, Defendants in Error, and also of the Opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 10th day of June, A. D. 1916.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHARLES W. VAIL,
Clerk Supreme Court.

79¾ Be it remembered, to-wit, that on the 11th day of February, A. D. 1916, there was duly filed by the plaintiff in error, Bernard Flexner, in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to The Hon. Edward Douglass White, Chief Justice of the United States, and to Hon. James Clarke McReynolds, Associate Justice of the United States, and to the other Justices of said Honorable Court, and to the Honorable The Supreme Court of the United States, which documents are in the words and figures as follows, to-wit:

80 Supreme Court of the United States.

The Petition of Bernard Flexner for a Writ of Error, Directed to the Supreme Court of the State of Illinois, to Bring Up Before this Court the Case of Bernard Flexner, Plaintiff in Error,

against

John Farson, Jr., William Farson, and John A. McElroy, Doing Business as Partners under the Name and Style of Farson, Son & Company, Defendants in Error.

To the Honorable Edward Douglass White, Chief Justice of the United States, and to the Honorable James Clarke McReynolds, Associate Justice of the Supreme Court of the United States, and to the other Justices of said Honorable Court, and to the Honorable the Supreme Court of the United States:

The petition of Bernard Flexner, who resides in the City of Chicago, County of Cook, and State of Illinois, respectfully shows:

I. Heretofore, and on or about the 6th day of March, 1914, an action of debt was commenced in the Circuit Court of Cook County, State of Illinois, by Bernard Flexner, plaintiff, against John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company. The declaration as amended in said action alleged: That on January 31, 1914, in the Jefferson Circuit Court, in and for Jefferson County, State of Kentucky, the same being a court of general jurisdiction, duly created and organized under the laws of the State of
81 Kentucky, by the judgment of said Court Bernard Flexner recovered a judgment against the defendants in a certain action pending before said Court, in which Bernard Flexner was plaintiff and John Farson, Jr., William Farson and John A. McElroy, doing business as partners, under the name and style of Farson, Son & Company, were defendants, for the sum of $1503.00, with interest thereon at the rate of 6% per annum from December 11, 1911, until paid, and his costs in said suit expended; that said action and the said judgment therein recovered grew out of a certain transaction involving the sale by said defendants to plaintiff of certain bonds on about December 11, 1911, and that said transaction occurred in the City of Louisville, Jefferson County, Kentucky, and the cause of action on which said judgment was and is based occurred in said Jefferson County, Kentucky; that on said date of December 11, 1911, and for a long time prior thereto, the said defendants were doing business as partners under the name and style above mentioned in Jefferson County, Kentucky, and engaged in the buying and selling of bonds in said County and State, but were non-residents of the State of Kentucky at said time; and that on said date of December 11, 1911, and a long time prior thereto, one Washington Flexner was the manager, agent and person in charge in said County and State of the business so carried on by the defendant partnership in said State, and he conducted, on behalf of said partnership, the transaction hereinabove referred to; that since said December 11,

1911, and at the time of the institution of the suit in Jefferson County, Kentucky, and at the time of the service of process therein on said defendants, they and each of them continued to be, and were at the time of the institution of the suit in the Circuit Court of Cook County, Illinois, non-residents of the State of Kentucky and neither had any officer, manager, agent or person in charge of their business within the State of Kentucky other than the said Washington Flexner; that at the time of the institution of said suit in the Circuit Court of Jefferson County, Kentucky, and on the said date 82 of December 11, 1911, and for a long time prior thereto, and on the date that the said suit was instituted in Cook County, Illinois, and at all times intervening between said dates, there was in full force and effect throughout the State of Kentucky a certain statutory provision, known as Sub-section 6 of Section 51 of the Kentucky Civil Code, which provision is as follows: "In actions against an individual residing in another State, or a partnership, association or joint stock company, the members of which reside in another State, engaged in business in this State, summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action *occurred"*; that the summons of said Jefferson Circuit Court issued in said cause and directed to said defendants and each of them was duly executed and served on said Washington Flexner in person in said Jefferson County as agent of said defendants, in accordance with and as provided by said Statute and the practice of said Court; that said judgment still remains in full force and effect, and no part of same has been paid, and that the same is entitled within the State of Illinois to full faith and credit under and by virtue of the provisions of Section 1 of Article 4 of the Constitution of the United States.

II. Summons in the said action in the Circuit Court of Cook County, Illinois, was duly executed on the defendant, William Farson, who made defense by filing certain pleas to said declaration as amended and charged, among other things, first, that the judgment obtained in the Circuit Court of Jefferson County, Kentucky, was not entitled to full faith or credit, as provided by the Federal Constitution, in the State of Illinois because the same was invalid in that the process in said suit was not personally served upon the defendants, or either of them, and that neither of said defendants entered his appearance in said suit; second, that Subsection 6 of Section 51 of the Kentucky Civil Code was invalid insofar as 83 it authorized a personal judgment to be rendered against said defendants by service upon their said agent, Washington Flexner, because the same permitted property of said defendants to be taken without due process of law, and denied the defendants equal privileges and immunities with citizens and residents of Kentucky, in violation of Section 2 of Article 4 of the Constitution of the United States, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

III. Your petitioner, Bernard Flexner, demurred to the said pleas of the defendant, William Farson, but the Circuit Court of Cook

County, Illinois, overruled said demurrer; the petitioner then elected to stand by said demurrer, and judgment was thereupon entered in favor of the defendants, from which judgment the petitioner was granted an appeal to the Supreme Court of Illinois. Said appeal was duly heard in the Supreme Court of the State of Illinois, and your petitioner insisted by briefs filed in said Court that: (1) the judgment rendered by the Circuit Court of Jefferson County, Kentucky, was valid and entitled to full faith and credit in the State of Illinois, as guaranteed by Section 1 of Article 4 of the Constitution of the United States; (2) the said Sub-section 6 of Section 51 of the Kentucky Civil Code did not violate the Federal Constitution and did not deny to the defendants equal privileges and immunities with citizens and residents of Kentucky, as provided by Section 2 of Article 4 of the Constitution of the United States; (3) Sub-section 6 of Section 51 of Kentucky Civil Code did not violate the Federal Constitution, and that it afforded the defendants due process of law, as provided by Section 1 of the Fourteenth Amendment of the Constitution of the United States. By an opinion filed June 24, 1915, the Supreme Court of Illinois affirmed the judgment of the Circuit Court of Cook County, Illinois, and held that the Kentucky judgment was not entitled to full faith and credit in the State of Illinois; that said judgment was invalid; that Sub-section 6 of Section 51 of the
84 Kentucky Civil Code violated the Federal Constitution in that
it did not afford due process of law, and denied to non-residents equal privileges and immunities with citizens and residents of the State of Kentucky.

IV. The Supreme Court of the State of Illinois is the highest court of the said State of Illinois in which a decision in this suit and in this matter could be had, and the judgment rendered by said Court is a final judgment.

V. Your petitioner further shows that Federal questions were made in said case, to-wit: (1) that the Kentucky judgment was not entitled to full faith and credit as guaranteed by the Federal Constitution; (2) Sub-section 6 of Section 51 of Kentucky Civil Code violated the Federal Constitution in that it did not afford the defendants in this case due process of law; (3) Sub-section 6 of Section 51 of Kentucky Civil Code violated the Federal Constitution in that it did not afford to non-residents equal privileges and immunities with citizens and residents of the State of Kentucky.

Petitioner further says that by the decision of the Supreme Court of Illinois he was denied a title, right, privilege and immunity specially set up and claimed by him under the Constitution of the United States, and that the action of the Supreme Court of Illinois in declaring Sub-section 6 of Section 51 of Kentucky Civil Code unconstitutional, was an error which he can ask the Supreme Court of the United States to correct. All of said errors are contained in Assignment of Errors filed herewith on this date.

Wherefore, your petitioner prays that a Writ *or* Error may issue, and that he be allowed to bring up for review before the Supreme Court of United States an exemplified transcript of the record of the Supreme Court of Illinois in said case, and the judgment of the Su-

preme Court of Illinois therein; that citation be granted and signed; in order that the errors complained of may be reviewed in the Supreme Court of the United States, and that the aforesaid judg-
84½ ment of said Supreme Court of Illinois be reversed. Your petitioner further prays that he may have such other and further relief in the premises as may be just; and your petitioner will ever pray, etc.

BERNARD FLEXNER.

RALPH D. STEVENSON,
ROBT. G. GORDON,
J. S. LAURENT,
Attorneys for Petitioner, Louisville, Ky.

STATE OF ILLINOIS,
County of Cook, ss:

Bernard Flexner, being duly sworn, deposes and says that he is the foregoing petitioner, and that the foregoing petition is true of his own knowledge and belief.

Subscribed to before me this 9th day of February, 1916.

[Seal Margaret Murphy, Notary Public, Cook County, Ill.]

MARGARET MURPHY,
Notary Public, Cook County, Ill.

84¾ [Endorsed:] Filed Feb. 11, '16. Chas. W. Vail, Clerk Supreme Court.

85 Supreme Court of the United States.

BERNARD FLEXNER, Plaintiff in Error,
against
JOHN FARSON, JR., WILLIAM FARSON, and JOHN A. MCELROY, Doing Business as Partners under the Name and Style of Farson, Son & Company, Defendants in Error.

Assignment of Errors.

And now comes Bernard Flexner, plaintiff in error, and makes and files this his assignment of error-.

I. The Supreme Court of the State of Illinois erred in refusing to give full faith and credit to the judgment rendered in favor of plaintiff in error by the Circuit Court of Jefferson County, Kentucky, as guaranteed by Section 1 of Article IV of the Constitution of the United States.

II. The Supreme Court of the State of Illinois erred in not holding that the judgment rendered by the Circuit Court of Jefferson County, Kentucky, was entitled to full faith and credit in the Courts of the State of Illinois as provided by Section 1 of Article IV of the Constitution of the United States, which reads as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

86 III. The Supreme Court of the State of Illinois erred in holding that Sub-section 6 of Section 51 of the Kentucky Civil Code violated either Section 1 of the Fourteenth Amendment or Section 2 of Article IV of the Constitution of the United States. Said section of the Kentucky Civil Code reads as follows:

"In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the cause of action *occurred.*"

IV. The Supreme Court of the State of Illinois erred in not holding that said Sub-section 6 of Section 51 of the Kentucky Civil Code does not deprive the defendants in error of their property without due process of law as provided by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

V. The Supreme Court of the State of Illinois erred in not holding that Sub-section 6 of Section 51 of the Kentucky Civil Code does not deny to non-residents of the State of Kentucky equal privileges and immunities with citizens and residents of the State of Kentucky, as provided by Section 2 of Article IV of the Constitution of the United States.

VI. The Supreme Court of the State of Illinois erred in not reversing the judgment of the Circuit Court of Cook County, Illinois, which judgment refused to give full faith and credit to the judgment of the Circuit Court of Jefferson County, Kentucky, as guaranteed by Section I of Article IV of the Constitution of the United States, and which judgment held that Sub-section 6 of Section 51 of the Kentucky Civil Code violated Section 2 of Article IV and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

87 VII. The Supreme Court of the State of Illinois erred in holding that the judgment rendered by the Circuit Court of Jefferson County, Kentucky, was invalid and in violation of Section 2 of Article IV and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

VIII. The Supreme Court of the State of Illinois erred in holding that the Circuit Court of Jefferson County, Kentucky, did not have jurisdiction over the defendants in error in the action in which the judgment sued on was rendered.

IX. The Supreme Court of the State of Illinois erred in rendering judgment against plaintiff in error and in favor of defendants in error.

Dated this 9 day of February, 1916.

RALPH D. STEVENSON,
ROBT. G. GORDON,
J. S. LAURENT,
Attorneys for Bernard Flexner,
Plaintiff in Error, Louisville, Ky.

[Endorsed:] Filed Feb. 11, '16. Chas. W. Vail, Clerk Supreme Court.

88 To the Honorable the Supreme Court of the United States:

Bernard Flexner, Plaintiff in Error,
against
John Farson, Jr., William Farson, and **John A. McElroy**, Doing Business as Partners under the Name and Style of Farson, Son & Company, Defendants in Error.

And now comes Bernard Flexner, the plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the State of Illinois in the action brought by Bernard Flexner, plaintiff, against John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, defendants, and he prays that said judgment be annulled and altogether held for naught.

RALPH D. STEVENSON,
ROBT. G. GORDON,
J. S. LAURENT,
Attorneys for Plaintiff in Error.

524 Paul Jones Building, Louisville, Kentucky.

[Endorsed:] Filed Feb. 11, '16. Chas. W. Vail, Clerk Supreme Court.

89 And afterwards, to-wit, on the 7th day of June, A. D. 1916, there was filed in the office of the Clerk of the Supreme Court of Illinois an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, a copy of which Bond is as follows, towit:

90 In the Supreme Court of the United States of America.

Bernard Flexner, Plaintiff in Error,
vs.
John Farson, Jr., William Farson, and **John A. McElroy**, Doing Business as Partners under the Name and Style of Farson, Son & Company, Defendants in Error.

Bond.

Know all men by these presents, that we, Bernard Flexner of Chicago, Illinois, and National Surety Company, a corporation organized under the State of New York, are held and firmly bound unto the above named John Farson, Jr., William Farson, and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, in the sum of Five Hundred ($500.00) Dollars, to be paid the said John Farson, Jr., William Farson and John A. McElroy, doing business under the name and style of Farson Son & Company, for the payment of which well and truly to be made, we bind ourselves and each of us, and the heirs, executors and administrators of Bernard Flexner, and the successors and assigns of National Surety Company, jointly and severally by these presents.

Signed by us this 22nd day of May, 1916, and sealed by the National Surety Company with its seal.

Whereas the above named Bernard Flexner has obtained a writ of error to be issued by the Supreme Court of the United States to the Supreme Court of the State of Illinois, to reverse the judgment rendered in the above entitled suit by said Supreme Court of the State of Illinois;

Now, therefore, the condition of this obligation is such, that if the above named Bernard Flexner shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to 91 prosecute said writ of error with effect, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

BERNARD FLEXNER,
By J. S. LAURENT, *Att'y.*
NATIONAL SURETY CO.,
[SEAL.] By W. H. RONSAVILLE,
Attorney-in-fact.

Witness as to Principal:
BLANCHE M. SIPLE.

Witness as to surety:
SALLIE J. CHALK.

Approved May 23d, 1916.

J. C. McREYNOLDS,
Associate Justice.

Filed Jun. 7, 1916. Chas. W. Vail, Clerk Supreme Court.

92 Be it remembered that on the 7th day of June, A. D. 1916, there was duly filed in the office of the Clerk of the Supreme Court of Illinois an original writ of error, which is hereby attached and is in words and figures as follows, towit:

93 Filed Jun- 7, '16. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Bernard Flexner, appellant, and John Farson, Jr., William Farson

and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;
or wherein any title, right, privilege, or immunity was
94 claimed under the Constitution, or any treaty or statute of,
or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Bernard Flexner, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of May, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

Filed Jun- 7, '16. Chas. W. Vail, Clerk Supreme Court.

95 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of the Supreme Court do hereby certify that there was lodged with me as such Clerk on the 7th day of June, A. D. 1916, in the matter of Bernard Flexner, Plaintiff in Error, vs. John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, Defendants in Error,

1. The original bond of which a copy is herein set forth.
2. A copy of the writ of error to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, Illinois, this 10th day of June, A. D. 1916.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHAS. W. VAIL,
Clerk Supreme Court.

96 Be it further remembered that on the 7th day of June, A. D. 1916, a certain Citation showing service, was filed in the office of the Clerk of the Supreme Court, which Citation is as follows, to-wit:

97 UNITED STATES OF AMERICA, *ss:*

To John Farson, Jr., William Farson and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company, appellees, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Illinois, wherein Bernard Flexner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James C. McReynolds, Associate Justice of the Supreme Court of the United States, this twenty-third day of May, in the year of our Lord one thousand nine hundred and sixteen.

J. C. McREYNOLDS,
Associate Justice of the Supreme
Court of the United States.

Filed Jun- 7, '16. Chas. W. Vail, Clerk Supreme Court.

97½ On this first day of June, in the year of our Lord one thousand nine hundred and sixteen, personally appeared John H. Anderson, Deputy U. S. Marshal, before me, the subscriber, who is a Deputy U. S. Marshal, in and for the Northern District of Illinois, at Chicago, Illinois, and makes oath that he delivered a true copy of the within citation to William Farson, as one of the partners, of the firm of Farson, Son & Company.

JOHN J. BRADLEY,
U. S. Marshal,
By JOHN H. ANDERSON, *Deputy.*

Sworn to and subscribed the 1st day of June, A. D. 1916.

[Seal Chris. F. Gunther, Notary Public, Cook County, Ill.]

CHRIS. F. GUNTHER,
NotaryPublic.

[Endorsed:] 13135. Filed Jun- 7, '16. Chas. W. Vail, Clerk Supreme Court. 212. J. F. R. Ent. E. C. C.

98 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 10th day of June, A. D. 1916.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHARLES W. VAIL,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 25,702. Illinois Supreme Court. Term No. 872. Bernard Flexner, plaintiff in error, vs. John Farson, Jr., William Farson, and John A. McElroy, doing business as partners under the name and style of Farson, Son & Company. Filed January 17th, 1917. File No. 25,702.

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IN THE

Supreme Court of the United States.

BERNARD FLEXNER, Plaintiff in Error

vs.

JOHN FARSON, JR., WILLIAM FARSON, AND
JOHN A. McELROY, DOING BUSINESS AS
PARTNERS UNDER THE NAME AND STYLE
OF FARSON, SON & COMPANY, Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

MAY IT PLEASE YOUR HONORS:

This case is before this Court pursuant to a writ of error directed to the Supreme Court of the State of Illinois, which latter Court refused to give full faith and credit to a judgment rendered by the Circuit Court of Jefferson County, Kentucky, in favor of Plaintiff in Error and against Defendants in Error.

For convenience, we shall refer to Plaintiff in Error as "plaintiff" and Defendants in Error as "defendants."

The Kentucky suit was instituted in the Circuit

Court of Jefferson County by plaintiff against the defendants to rescind a contract whereby plaintiff purchased of defendants certain bonds on properties in Colorado which were represented to be valuable but which were in fact worthless.

Summons was served in said suit on Washington Flexner, who was the manager and agent of defendants in charge of their said business in the State of Kentucky and who negotiated the sale of the bonds in question to plaintiff. None of the defendants entered his appearance to said suit and judgment was rendered against them as prayed for in the petition.

Suit was then brought upon said judgment in the Circuit Court of Cook County, Illinois, and same was sought to be enforced under the full faith and credit clause of the Federal Constitution.

The declaration in the case (the second amended declaration, Tr. of R. p. 15) after alleging the rendition of a judgment by the Jefferson Circuit Court of Jefferson County, Kentucky, a court of general jurisdiction under the laws of said state, for $1,503 and interest at 6 per cent from December 11, 1911, against defendants and in favor of plaintiff, alleges in substance that the defendants in the Kentucky suit (in which the judgment sued on was rendered) were nonresidents of the State of Kentucky, that they were not personally served with process within the State of Kentucky, and did not appear by attorney or otherwise in said suit, but that the Kentucky judgment sued on was rendered upon service of process had under the provisions of *Subsection 6* of *Section 51* of the *Kentucky Civil Code*, which was set forth as follows:

"In actions against an individual residing in

> another state, or a partnership, association or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent of or person in charge of such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred."

That the Kentucky suit and judgment grew out of the sale on or about December 11, 1911, in the City of Louisville, Jefferson County, Kentucky, by defendants to plaintiff of certain bonds; that at said time defendants were a partnership doing business as Farson, Son & Company, and were non-residents of Kentucky and engaged in Louisville, Jefferson County, Kentucky, in the business of buying and selling bonds; that at said time one Washington Flexner was the manager and agent and person in charge in said city and county of the business carried on by the defendants in Kentucky and conducted said sale on behalf of the defendant partnership; that ever since said time defendants have continued to be non-residents of Kentucky and have had since said time in the State of Kentucky no officer, manager, agent, or person in charge of their business, other than Washington Flexner; and that under the laws of Kentucky the said Flexner remained the agent of defendants on whom process against defendants could be served in any suit arising out of that particular transaction.

That process in the Kentucky suit was duly served upon the defendants by serving same upon the said Washington Flexner as their agent; that thereby the Kentucky court acquired jurisdiction of the defendants; and that the Kentucky judgment is entitled to full faith and credit under *Section 1* of *Article IV* of the *Constitution of the United States.*

DEFENDANTS' PLEAS.

The defendant's pleas (being defendant's pleas to the amended declaration extended by order of the court to the second amended declaration, Tr. of Record page 38) presented in substance the following alleged defenses:

First: That the Kentucky judgment was rendered without due process of law guaranteed by the Constitution of the United States, in that the defendant was not personally served with process within Kentucky and did not enter his appearance by attorney in said suit or otherwise submit his person to the jurisdiction of said court. (See plea I, Tr. of Record page 15, and Plea II, Tr. of Record pp. 25-26.)

Second: That Subsection 6 of Section 51 of the Kentucky Civil Code, under the provisions of which service was had in the Kentucky suit, denied defendant equal privileges and immunities with citizens and residents of Kentucky, in violation of the Constitution of the United States, and is therefore void. (Plea III, Tr. of Record pp. 26-27, and Plea VIII, pages 30-32.)

Third: That at the time of the commencement of the Kentucky suit, and thereafter, Washington Flexner, on whom service of process was had, was not the agent of the defendants, or any of them. (Plea VI, Tr. of Record, pp. 28-29, and Plea VII, Tr. of Record p. 29.)

Fourth: That at the time of the commencement of the Kentucky suit, and thereafter, the defendants therein were not doing business as partners as Farson, Son and Company. (Plea IV, Tr. of Record p. 27.)

Fifth: That at the time of the commencement of the suit in the Circuit Court of Cook County on the Kentucky judgment, the defendants were not doing business as partners. (Plea V, Tr. of Record pp. 27-28.)

The plaintiff demurred to each of said pleas, but the Circuit Court of Cook County, Illinois, overruled said demurrers. The plaintiff elected to stand upon his demurrers, and the petition was dismissed. The plaintiff then took an appeal to the Supreme Court of the State of Illinois.

The Supreme Court of the State of Illinois, in an opinion written by Carter, J., held that the Kentucky judgment was not entitled to full faith and credit under the Constitution of the United States for the reason that summons was not personally served on any of the defendants in the State of Kentucky and that the Kentucky Statute which authorized substituted service upon the agent of defendants and the manager of their business in the State of Kentucky was violative of the "due process" clause of the Federal Constitution and therefore void. (Tr. of Record pages 44, et seq.)

Thereupon the case was brought to this Court on writ of error. Plaintiff complains of the ruling and judgment of said Supreme Court of Illinois and has assigned and now relies upon the following errors:

ASSIGNMENT OF ERRORS.

I. The Supreme Court of the State of Illinois erred in refusing to give full faith and credit to the judgment rendered in favor of plaintiff in error by the Circuit Court of Jefferson County, Kentucky, as guaranteed by Section 1 of Article IV of the Constitution of the United States.

II. The Supreme Court of the State of Illinois erred in not holding that the judgment rendered by the Circuit Court of Jefferson County, Kentucky, was entitled to full faith and credit in the Courts of the State of Illinois as provided by Section 1 of Article IV of the Constitution of the United States, which reads as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

III. The Supreme Court of the State of Illinois erred in holding that Subsection 6 of Section 51 of the Kentucky Civil Code violated either Section 1 of the Fourteenth Amendment or Section 2 of Article IV of the Constitution of the United States. Said section of the Kentucky Civil Code reads as follows:

> "In actions against an individual residing in another State, or a partnership, association or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of such business in this State, in the county where the cause of action *occurred.*"

IV. The Supreme Court of the State of Illinois erred in not holding that said Subsection 6 of Section 51 of the Kentucky Civil Code does not deprive the defendants in error of their property without due process of law as provided by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

V. The Supreme Court of the State of Illinois erred in not holding that Subsection 6 of Section 51 of the Kentucky Civil Code does not deny to non-residents of the State of Kentucky equal privileges and immunities with citizens and residents of the State of Kentucky, as provided by Section 2 of Article IV of the Constitution of the United States.

VI. The Supreme Court of the State of Illinois erred in not reversing the judgment of the Circuit Court of Cook County, Illinois, which judgment refused to give full faith and credit to the judgment of the Circuit Court of Jefferson County, Kentucky, as guaranteed by Section 1 of Article IV of the Constitution of the United States, and which judgment held that Subsection 6 of Section 51 of the Kentucky Civil Code violated Section 2 of Article IV and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

VII. The Supreme Court of the State of Illinois erred in holding that the judgment rendered by the Circuit Court of Jefferson County, Kentucky, was invalid and in violation of Section 2 of Article IV and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

VIII. The Supreme Court of the State of Illinois erred in holding that the Circuit Court of Jefferson County, Kentucky, did not have jurisdiction over the defendants in error in the action in which the judgment sued on was rendered.

IX. The Supreme Court of the State of Illinois erred in rendering judgment against plaintiff in error and in favor of defendants in error.

ARGUMENT.

It is a fundamental proposition in support of which we need cite no authority in this court that so far as the validity of the Kentucky judgment is concerned the only question open to inquiry by the Illinois courts is as to the jurisdiction of the Kentucky court rendering the judgment.

The defendants' pleas assert in effect that the Kentucky court did not have jurisdiction of the defendants for the reasons: (1) that the rendition by a Kentucky court of a judgment *in personam* against an individual or individuals without personal service of process upon the defendants within Kentucky and without the entry of an appearance in the suit and without any voluntary submission of the persons of the defendants to the jurisdiction of the Kentucky court, constituted a denial of due process of law under the Federal Constitution; (2) that Subsection 6 of Section 51 of the Kentucky Civil Code, under the provisions of which service in the Kentucky suit was had, and which authorizes service of process against a non-resident individual or individuals doing business in Kentucky by serving same upon an agent in Kentucky in charge of such business, denies equal privileges and immunities as between the citizens and residents of Kentucky and of other states, and therefore violates the Federal Constitution and is void; (3) that assuming the foregoing provisions of the Kentucky Civil Code to be valid, that its provisions were not followed in the Kentucky suit in that Washington Flexner, on whom service of process was had, was not the agent of the defendants at the time process was served.

It is submitted that if Subsection 6 of Section 51 of the Kentucky Civil Code in authorizing service of summons in the manner provided does not violate the "due process" clause or the "equal privilege and immunities" provisions of the Federal Constitution, then it must follow that the method therein provided is a valid and proper method of acquiring jurisdiction of parties to a suit in cases coming within the terms of said Subsection, and that a judgment rendered upon process served in conformity to the provisions thereof must be given full faith and credit by the courts of Illinois under Section 1 of Article IV of the Federal Constitution.

LEGAL PROPOSITIONS.

We therefore rely upon the following propositions in support of the validity of the Kentucky statute and the judgment of the Kentucky court which was rendered thereunder, to-wit:

> "Due process of law" is not susceptible of any restricted definition, but can be adapted to the changing conditions of society and business. Any legal proceeding which is consonant with natural

justice in the light of present conditions affords due process of law. It does not require adherence to fixed rules of procedure.

Magna Charta, Sections XXXIX and XL.
Daniel Webster's Definition of "due process of law."
Iowa Central Ry. Co. vs. Iowa, 160 U. S. 389.
Blacks Constitutional Law, pages 571-572.
Hurtado vs. California, 110 U. S. 516, 28 L. ed. 232.
2 Words and Phrases (New Series) p. 167.
State vs. Sponaugle, 45 W. Va. 415, 43 L. R. A. 729.
Davidson vs. New Orleans, 96 U. S. 97, 24 L. ed. 616.
Tenement House etc. vs. Weil, 134 N. Y. Sup. 1062.
Ballard vs. Hunter, 204 U. S. 242, 51 L. ed. 422.
Guenther vs. American Steel Hoop Co., 116 Ky. 580.

Laws which subsist at the time and place of making a contract enter into and form a part thereof. Subsection 6 of Section 51 of the Kentucky Civil Code was, therefore, impliedly written into the contract sued on herein.

Edward vs. Kearzey, 96 U. S. 595, 24 L. ed. 796.
Thomas vs. Mathieson, 234 U. S. 221 58 L. ed. 577.
Mutual Reserve & Co. vs. Phelps, 190 U. S. 147, 47 L. ed. 987.

A state may provide by statute that in suits against a non-resident partnership engaged in business in said state, summons may be served on the manager or agent in charge of said business in said state in suits on contracts growing out of the business conducted in said state. Service of

process made in pursuance to such a statute is valid and a judgment rendered thereon is entitled to full faith and credit in each of the several states.

Guenther vs. American Steel Hoop Co., 116 Ky. 580.
Johnson vs. Westfield's Admr., 143 Ky. 10.
Alaska Commercial Co. vs. Debney, 141 Fed. 1.
Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 565.
In re Jonas Grossmayer, 177 U. S. 48, 44 L. ed. 665.
Wilson vs. Seligman, 144 U. S. 41, 36 L. ed. 338.
Kane vs. New Jersey (U. S.), decided Dec. 4, 1916.
Continental Natl. Bank vs. Folsom, 78 Ga. 449, 3 S. E. 269.
Vallee vs. Dumergue, 4 Exch. 290, 18 L. J. Exch., N. S. 398.
Copin vs. Anderson, L. R. 9 Exch. 345.
Bank of Australia vs. Nias, 16 Q. B. 717, 20 L. J. Q. B., N. S. 284.
Thomas vs. Matthiesson, 234 U. S. 221, 58 L. ed. 577.
Mutual Reserve Etc. Assn. vs. Phelps et al, 190 U. S. 147, 47 L. ed. 987.

The provision of the Kentucky Civil Code does not deny equal privileges and immunities to the citizens of the several states. It applies to all citizens alike who are non-resident of the state. It is well settled that a state may provide a mode of service for non-residents different from that which applies to residents.

Blake et al vs. McClung et al, 172 U. S. 239, 43 L. ed. 432.
Conner vs. Elliott, 59 U. S. 591, 15 L. ed. 498.

Ballard vs. Hunter, 204 U. S. 242, 51 L. ed. 462.
Watston vs. Nevin, 128 U. S. 587, 32 L. ed. 544.
Hayes vs. Missouri, 120 U. S. 68, 30 L. ed. 578.

A state may validly provide by statute that process against the members of a non-resident partnership may be served on the agent who was in charge of their business in said state and transacted the business in the state out of which the suit arose, although such agent had ceased to represent his principals at the time of the institution of the suit; provided that there be no other agent in the state on whom process can be served.

Nelson Morris vs. Rehkopf & Sons, 25 Ky. L. R. 352.
International Harvester Co. vs. Commonwealth, 147 Ky. 664.
Fireman's Ins. Co. vs. Thompson, 155 Ill. 204.
Mutual Reserve Etc. Co. vs. Phelps, 190 U. S. 147, 47 L. ed. 987.

Judgment rendered by the courts of a state must be consistent with due process of law, and if they are valid in the state where rendered they are entitled to full faith and credit in the courts of the several states, and vice versa.

McDonald vs. Mabee (U. S.), decided January 31, 1917.

I.

SUBSECTION 6 OF SECTION 51 OF THE KENTUCKY CIVIL CODE AFFORDS DUE PROCESS OF LAW AND IS NOT VIOLATIVE OF THE FEDERAL CONSTITUTION.

In order to avoid unnecessary argument, we concede that the Kentucky judgment is not entitled to full faith and credit within the State of Illinois unless the Kentucky court had acquired jurisdiction over the person of the defendants at the time it rendered a personal money judgment against them. However, we insist that if Subsection 6 of Section 51 of the Civil Code of Kentucky is not contrary to the Federal Constitution, then the Courts of Illinois must enforce the judgment of the Kentucky Courts. For convenience of the Court, we again quote said provision of the Kentucky Civil Code:

> "In actions against an individual residing in another state, or a partnership, association or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent of or person in charge of such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred."

An analysis of the Illinois opinion shows that the sole reason for holding that the above statute did not afford due process of law was that a personal judgment cannot be rendered against a defendant who has not been personally served with process within the jurisdiction of the court or has not voluntarily entered his appearance in the suit. The application of this general rule by the Supreme Court of Illinois to the facts of the case at bar constitutes the fundamental error of its decision.

We submit that there can be no iron-bound definition of what is and what is not "due process of law." Each case must be governed by the peculiar facts and circumstances involved. If the principle announced by the Supreme Court of Illinois should be adopted as the law applicable to all cases, most of the process laws on the statute books would be wiped out.

To illustrate: Practically every state in the Union has statutes authorizing the service of process upon a guardian; upon the committee of a lunatic; and also provide that process may be left at the last known place of abode of an adult defendant. These laws have become thoroughly a part of our jurisprudence and no court has ever held that such statutes were void because they did not provide for personal service upon the infant, lunatic, etc. The service of process in such cases is just as much substituted service of process as it is in the case at bar, and we are unable to see any difference in principle in their application.

So we repeat that any authority is unsound which lays down as applicable to all cases the proposition that a statute does not afford due process of law which allows a personal judgment to be rendered upon a defendant without personal service of process within the jurisdiction of the court.

In determining the constitutionality of this statute, it will be helpful to review the history and interpretation of the "Fourteenth Amendment" in order to understand its real purpose and scope.

The phrase "due process of law" is in principle identical with those designated in Great English Charters as the "law of the land." The XXXIXth and XLth Articles of the Magna Charta assert that:

> "No free man shall be taken or imprisoned or disseized or outlawed, or exiled, or anywise destroyed. Nor will we go upon him, nor send upon him, but by the lawful judgment of his peers, or

> by the law of the land. To none will we sell, to none will we deny, or delay, right or justice."

Daniel Webster in his Darthmouth College case said:

> "By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

> "Due process of law is but an enlargement of the Magna Charta. By the law of the land, means by due process of law, that is, without presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause, in effect, affirms the right of trial according to the process and proceedings of the Common Law."

In *Iowa Central Railway Company v. State of Iowa*, 160 U. S. 389, Mr. Justice White said:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, *provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."*

(Italics are ours.)

The above quotations aptly illustrate the proposition that no restricted definition can be laid down as what is due process of law. It is a comprehensive and elastic phrase which must ever meet the changing conditions and necessities of society.

As stated in *Black's Constitutional Law*, pages 571-572:

> "In view of the rule that words and phrases, used in constitutions, which had acquired a settled meaning at common law, are to be understood in their ancient and fixed signification, it is important to inquire what was the meaning of the phrase 'law of the land' in the old English law. At the same time, while the historical interpretation of these words is of value, it is not to be relied on exclusively. Regard must be had to the principles of liberty which it was intended to perpetuate. It is true, as stated in *Murray's Lessee vs. Hoboken Land & Imp. Co.*, that any process not otherwise forbidden must be taken to be due process of law if it can show the sanction of settled usage both in England and this country. But this does not mean that everything known to the common law is due process of law. Neither does it mean that nothing can be held to answer this description unless it was a part of the common law or established by immemorial usage. 'To hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of process and improvement.' The constitutional guaranty does not deprive the state of the power to devise new remedies or processes, and to adapt them to the changing conditions of business and society. *That which the provision is intended to perpetuate is not remedies or forms of procedure, but the established principles of private right and distributive justice, the very substance of individual rights to life, liberty and property.* 'There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the

> best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. *On the contrary, we should expect that the new and varied experiences of our own situation and system will mould and shape it into new and not less useful forms.'*
>
> "In the first place, it must be evident that 'due process of law' means something more than a statute. An act of the legislature may be process of law, but it is not 'due process' *unless it conforms to the requirements of the constitution and to the settled principles of right and justice."*
>
> (Italics are ours.)

The above principles stated by Mr. Black are supported by *Hurtado vs. California,* 110 U. S. 516, 28 L. ed. 232. In this case Mr. Justice Matthews further said:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice must be held to be due process of law."

A very clear statement of this principle is found in *3 Words and Phrases* (New Series) page 167, as follows:

> "The constitutional guaranty of 'due process of law' prohibits every arbitrary interference with the property of a person and protects every citizen in the possession, enjoyment and disposition of his property; *but it is not intended to interfere*

> *with the government in determining by what remedies or process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided.*"
>
> (Italics are ours.)

In *State vs. Spanaugle*, 45 W. Va. 415, 43 L. R. A. 729, it was stated:

> "No definite definition—none but the most general—has been or can be given of 'due process of law.' The best the courts can do is to say, in each case as it arises, whether a given act or proceeding in the particular matter is due process of law. It depends how the question arises; that is, upon the matter or transaction involved.'"

In *Davidson vs. New Orleans*, 96 U. S. 97, 24 L. ed. 616, Mr. Justice Bradley said:

> "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be *suitable or* admissible in the special case, it will be adjudged to be 'due process of law,' but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"
>
> (Italics are ours.)

In *Tenement House Dept. of N. Y. vs. Weil*, 134 N. Y. S. 1062, it was said:

> "Personal service is not essential to due process of law, and the right to prescribe 'a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him' is within legislative power.

Hurley v. Olcott, 198 N. Y. 132, 28 L. R. A. (N. S.) 238."

As stated in *Ballard vs. Hunter*, 204 U. S. 242, 51 L. ed. 462:

> "A precise definition has never been attempted. * * * Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process of proceeding may be adopted to the nature of the case."

As stated in *Guenther vs. American Steel Hoop Co.*, 116 Ky. 580:

> "Under these principles, the legislature of any state may classify litigants according to the impracticability of obtaining personal service of process, and authorize substituted service when necessary to the administration of justice."

The foregoing authorities demonstrate that no general principle can be announced as to what constitutes due process in legal proceedings; that the facts and circumstances of each case must be looked to and the appropriateness of the proceedings for the particular case must be considered. The decision of the Illinois Supreme Court that personal service of summons is essential to due process of law is illogical and unsound when applied to different states of fact. There are many proceedings which afford due process of law although personal service of summons is not made on the defendant. We refer to the proceedings *in rem* for the attachment and sale of property *(Pennoyer vs. Neff)* and proceedings under the power of eminent domain. We refer also to proceedings under the taxing power *(Ballard vs. Hunter)* and also to suits against infants and lunatics where the summons is served on the guardian of the infant and the committee of the lunatic. It has likewise been held that summons may be left at the regular place of abode in the state of a resident defendant and that such service constitutes due process of law. *(McDonald vs. Mabee,* decided by this Court January 31, 1917). Thus we see that there are many proceedings, vastly dissimilar in their nature, which have been held valid where there was no personal service of summons on the defendant. But why should some proceedings be held valid and others invalid where personal service is not had? Why have the proceedings above enumerated been upheld? What is the criterion? We submit there is but one answer, and that is, the facts and circumstances of each case must be considered, and, if the proceeding is appropriate, reasonable and just, it will be upheld by the courts whether it be a judgment *in rem* or *in personom,* and although personal service was not made on the defendant.

Furthermore, the authorities above quoted demonstrate that if the notice or process in a judicial proceeding is reasonable and suitable to the facts in the case, and there is reasonable probability that the defendant will be apprized thereof in time to present his defense before a decision is made, such notice will constitute due process of law. In other words, if the proceeding is not oppressive or arbitrary and is not contrary to *natural justice,* it complies with the Fourteenth Amendment.

The Supreme Court of Illinois did not pass upon these questions when it declared that Subsection 6 of Section 51 of the Kentucky Civil Code was violative of the Federal Constitution. It did not ask if the statute of Kentucky was suitable to the proceeding, or if it afforded reasonable notice to the defendants of the pendency of the suit. It did not consider whether or not the proceedings under that statute and under the facts in this case were consonant with natural justice, or whether the enactment of the statute was justified by the exigencies of our complex commercial life. It was these considerations, and these alone, which should have influenced that great Court in reaching its conclusion as to the constitutionality of the Kentucky Statute.

It is true that there is a conflict in the authorities as to the constitutionality of statutes similar to the one under consideration. Some of the courts have held that it does afford due process of law and others have held that it does not. But it is our insistence that the Federal Courts, including this Court, have ruled in favor of the constitutionality of this statute, and such rulings are in accord with the real purpose and intent of the Fourteenth Amendment.

We contend that it is entirely competent for a state to enact a statute such as the one under consideration, and that any non-resident who carries on business in such state through an agent, impliedly assents and agrees, that in suits growing out of such business, process may be served upon him by serving same as provided in said statute. In other words, we insist that Subsection 6 of Section 51 of the Civil Code of Kentucky is impliedly written into every contract which is entered into in Kentucky under circumstances which make that section applicable.

As was stated in *Edwards vs. Kearzey*, 96 U. S. 595, 24 L. ed. 796:

> "It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."

The reasonableness and fairness of such an enactment as a practical matter is entirely apparent. If a non-resident of Kentucky goes into that state and conducts a business there, making contracts with and incurring liabilities toward the citizens of Kentucky, it does not seem unreasonable or oppressive to furnish an opportunity to the citizens of Kentucky of enforcing any remedies vouchsafed them by the law without pursuing the non-resident to the state of his residence, be it far or near. It is submitted that the result sought to be obtained by such a provision does not impress one as contrary in any way to the principles of "natural justice." The very fact that the people of a number of states have enacted similar provisions is the strongest evidence that such a method of service, far from violating is in entire accord with the general public's sense of natural justice, and that in this day and generation, at least, it is considered a fair, equitable and practical manner of handling such a situation.

So far as affording reasonable notice and giving to the parties sued a reasonable chance for a hearing is concerned, the method provided by the Kentucky statute is as well calculated to bring home actual notice to the parties served as any method of serving process other than delivering a copy or reading the same to the party sued.

In *Grannis v. Ordean et al.*, 234 U. S., 385, the Supreme Court of the United States says:

> "The fundamental requisite of due process of law is the opportunity to be heard."

The constitutionality of the Kentucky Code in this particular has been expressly passed upon and upheld by the highest court of Kentucky in the case of *Guenther v. American Steel Hoop Company*, 116 Ky., 580. In that case Guenther, the defendant, was a non-resident of Kentucky, engaged in business in that state, which business was in charge of one Wright. Summons in this suit against Guenther was served on Wright as agent. The defendant moved to quash the return of summons on ground that the court did not obtain jurisdiction over him. The Kentucky court said:

> "Similar provisions to these have been in force in this state from the earliest times, and in other states of the Union. In many of the states it is provided by statute that a copy may be left at the defendant's place of abode where it is impossible to obtain personal service. In New York, where substituted service is necessary, an order of the court is required, and the order cannot be attacked collaterally. In the Federal courts, without the aid of any statute, substituted service is allowed in an ancillary proceeding to bring in parties to the principal suit. See 19 Ency. of Pleading and Practice, pp, 620, 621. The general rule is that substituted service of process is equivalent to personal service, and warrants a personal judgment,

if made in the manner pointed out by the statute, on the ground that the defendant is presumed to have received the notice. *Sturgis v. Fay*, 16 Ind., 429, 79 Am. Dec., 440; *Rauber v. Whitney*, 125 Ind., 216, 25 N. E. 196; *People v. House*, 4 Utah, 382, 10 Pac., 843; *Conwell v. Atwood*, 2 Ind., 289; *Barbage v. American National Bank*, 95 Ga., 503, 20 S. E., 240; * * *

It is thus apparent that there have always been well-recognized exceptions to the general rule requiring personal service of the process on the defendant, and the competency of the Legislature to provide for a substituted service, when necessary, has been generally recognized by the courts. In *Biesenthall v. Williams*, 62 Ky., 331, 85 Am. Dec., 629, a suit was brought in this state to enforce a judgment rendered in Ohio on a service of process by leaving a copy at the defendant's residence, the defendant being then a citizen of Ohio. The court held the judgment valid, and enforced it, saying that this mode of service was, under the statute, an actual service of process, and that the laws of Ohio were binding upon the citizens of that state, although they could not operate extraterritorially. The non-resident of this state who comes into it and does business here does so subject to its laws, and when he carries on this business by a substitute the state may properly provide that the service of process on the substitute shall be legal. No sound distinction can be drawn between such a provision of the statute and that authorizing process against an infant under fourteen years of age or a lunatic to be served on the person having charge of him, or against the persons operating a railroad on the agent in the county where the transaction occurs. If notice of the action does not in fact reach the defendant, ample remedy is also provided by the code for the granting of new trials, where, from unavoidable casualty or misfortune, the party is prevented from appearing or defending. Code, Section 518; *McCall v. Hitchcock*, 9 Bush., 66. In the case before us the defendant in fact received notice of the action, for he appeared and moved to quash the process. In the case of *Moredock v. Kirby* (C. C.), 118 Fed., 180, process served under the statute in question was quashed by the Circuit Court of the United States for the District of Kentucky upon the authority of *Pennoyer v. Neff*, and because it deprived citizens of other states of the rights and privileges of citizens of this state. We cannot see that Section 2 of Article 4 of the Constitution of the United States has any application. As shown, the statutes of the state allow substituted service of process on other classes of persons than non-residents of the state, The rights and privileges guaranteed to the citizens of the states by the Federal Constitution are their fundamental rights as citizens. What rights the guaranty includes the Supreme Court has declined to define but legal remedies may be allowed against those who are domiciled without the state which are not allowed against those who are domiciled within it. Thus, in Cooley on Constitutional Limitations (6th Ed.), 490, after pointing out certain rights that are included, it is said: 'But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon the actual residence; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the state, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor or not a resident of the state, notwithstanding such process is not admissible against a resident.' So it is held that a statute requiring security for cost from non-resident plaintiffs suing in the state is valid. Id., p. 25, note; 19 Ency. of Pleading and Practice, 344, and

> cases cited. Under these principles the Legislature of any state may classify litigants according to the impracticability of obtaining personal service of process, and authorize substituted service when necessary to the administration of justice. This right of the states seems to be expressly recognized by the Supreme Court in *Pennoyer v. Neff*. We therefore conclude that the statute is not invalid, and that the motion to quash the process was properly overruled."

It will be noticed that the Court of Appeals of Kentucky in the above case said:

> "The judgment complained of was not rendered on constructive service of process, nor is the question now raised as to what effect should be given the judgment beyond the confines of this State, where the statute authorizing the mode of service which was followed is without force."

Counsel for defendant have used the above quotation in an effort to destroy the authority of that case in support of plaintiff's contention. They have cited also in this connection *Black on Judgments* and *Grover vs. Radcliffe*, 137 U. S. 297. The distinction attempted to be made to the effect that a judgment may be valid in the State where rendered, but will not be so regarded when it is sought to be enforced in the courts of other states, is wholly unsound. Such a distinction may have been possible prior to the adoption of the Fourteenth Amendment, but under said amendment a judgment to be enforceable in the state where rendered must not be violative of the "due process of law" clause; and if it is not violative of said clause, it is entitled to full faith and credit in every state of the Union.

This question, however, is put at rest in the case of *McDonald vs. Mabee,* decided by this Court on January 31, 1917, in an opinion written by Mr. Justice Holmes, wherein it was said:

> "Whatever may be the rule with regard to decrees concerning status or its incidents (Haddock v. Haddock, 201 U. S. 562, 569, 632, 50 L. ed. 867, 869, 895, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1), an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it (201 U. S. 567, 568). If the former judgment had been sued upon in another state by the plaintiff, we think that the better opinion would justify a denial of its effect. If so, it was no more effective in Texas."

In connection with the above, see also elaborate notes in *50 L. R. A. 584,* et seq., and *35 L. R. A. (N. S.) 292,* et seq.

Again, in the case of *Johnson v. Westfield's Admr.,* 143 Ky., 10, the highest court of Kentucky held that substituted process could be had upon a non-resident owner of a steamboat by delivering a copy thereof to the master of the boat, who was the agent in charge of the non-resident's business in Kentucky. In upholding the service upon the agent, Bowles, the court said:

> "It needs no argument to show that the language of the section just quoted is broad enough to uphold the service upon Johnson, since he was engaged in the business of running the steamboat Samuel in the State of Kentucky, and Bowles was the captain and master of the boat under the employment of Johnson. Bowles had complete and entire charge, not only of Johnson's business in

> Kentucky, but of the particular business that had caused the injury which was the subject of the action. The court properly overruled the motion to quash the service upon the summons and the plea to the jurisdiction. *Guenther v. American Steel Hoop Co.*, 116 Ky., 508."

The identical question now before the court has been expressly decided by the United States Circuit Court of Appeals, Ninth Circuit (reversing the District Court of Alaska) in the case of *Alaska Commercial Co. v. Debney,* 141 Fed., 1. That was an action brought in the District Court of Alaska on a Canadian judgment rendered in a suit brought in the Territorial Court of Yukon, Canada, by the plaintiff against the defendant on a promissory note. It appeared that process in the Canadian suit was served upon the defendant by delivering copies thereof within Yukon Territory, Canada, to the defendant's agent (his brother), who was then and there in charge of defendant's business. The Canadian statute authorizing that form of service was as follows:

> "(14) Service of writ of summons shall be effected by copy as follows: (1) by personal service anywhere in the territories; (2) in case any defendant is out of the territories but has an agent, managing clerk, or other representative, resident and carrying on his business within the same, service of the writ of summons may be made on such agent, managing clerk, or other representative."

In his answer to the Alaska suit the defendant set up that the Candian court did not have jurisdiction of him; that at the time the Canadian suit was commenced he was a bona fide resident of the District of Alaska and a citizen of the United States; that he was not in Yukon Territory, Canada, and had no notice of the suit therein; that no process of any kind was served upon him personally, by publication or upon any one authorized to admit service of process upon him, and that he did not appear in the action either in person or by attorney.

The United States Circuit Court of Appeals held that the Canadian court by virtue of the service of process in pursuance of the foregoing statute duly acquired jurisdiction of the defendant; that the judgment was valid and on principles of *comity* recognized and enforced the judgment in Alaska.

The court among other things said:

> "In the case in hand the sole objection made to the validity of the judgment in the case between these parties in the Territorial Court of Yukon Territory is the lack of service of process issued in that case upon the defendant. * * *
>
> A part, at least, of the claim of the plaintiff against the defendant, according to his own testimony, grew out of business transactions between the parties in Yukon Territory, and in the course of his mining operations there. He had transferred to an agent of the plaintiff, as security for his indebtedness, an interest in a mining claim on Dominion Creek. Certainly, the matter of that indebtedness had not, according to the defendant's own testimony, been settled when he left the territory, and it is equally certain that before leaving he appointed his brother, A. W. Debney, his attorney to represent him in that territory and transact any and all business relating to his interests therein. We think it clear that the evidence shows, without any substantial conflict, that A. W. Deb-

> ney was the defendant's agent and legal representative, within the meaning of the provision of the Canadian statute in question, and that the service upon him in the action there brought was a valid service, and, accordingly, that the judgment there rendered was a valid judgment. It results that the judgment of the court below must be reversed, without reference to the other questions discussed by counsel.
>
> The judgment is reversed, and cause remanded for further proceedings."

It is submitted that the foregoing case is absolutely in point upon the question before this court. The facts and circumstances were as nearly identical as possibility admits, with this difference, that the United States Circuit Court of Appeals voluntarily, as a matter of comity, recognized and gave effect to the Canadian judgment.

The validity of the Candian Statute in the above case is tested by the same considerations which affect the statute of Kentucky. The Canadian Statute must not violate the "law of the land" provision of the Magna Charta, and the Kentucky Statute must not violate the "due process of law" clause of the Constitution; and the courts of this country have held that these terms are synonymous. (See authorities supra.)

An examination of the decisions of this Court illustrate that every utterance which this Court has made has been in favor of the constitutionality of the Kentucky Statute. In fact, we think that decisions have been rendered by this Court in cases so analogous to the one at bar that there is direct authority in its decisions in favor of the validity of the statute in question.

The leading case on this entire subject is *Pennoyer v. Neff*, 95 U. S., 714, 24 L. ed., 565. That case made it the established law that (*except in cases in which substituted service of process may be considered to have been assented to in advance*) that a judgment *in personam* rendered by a state court against a non-resident is invalid unless such non-resident be personally served with process within the state or enter his appearance therein by attorney or otherwise. The exact point before the court was the validity of a judgment *in personam* rendered by an Oregon court against a non-resident of that state, service of process in the Oregon suit having been made by publication, as authorized by the Oregon statute. The judgment was held to be of no force and effect either within or without the State of Oregon. In its opinion in that case, however, the Supreme Court of the United States (by Mr. Justice Field) used the following language (p. 734):

> "Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and

> without the state. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch., 290, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed even though he may not have actual notice of them.' See, also *Ins. Co. v. French (supra)*, and *Gillespie v. Ins. Co.*, 12 *Gray*, 201. Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. *Copin v. Adamson*, L. R., 9, Ex. 345."

Certainly, the language of the Court above quoted effectively shields the method of service provided by the Kentucky Civil Code from the condemnation of that case. The Court went out of its way to distinguish the mode of service now before this Court from the service there expressly disapproved and held invalid. But the language above quoted does more than merely make plain that its decision does not intend to invalidate a mode of service similar to that in the case at bar. We submit that it affirmatively approves this mode of service and cites the case of *Vallee v. Dumergue* in support thereof.

There is another case decided by this Court which is a direct authority in support of the service had in the case at bar. In the case of *In re Jonas Grossmayer*, 177 U. S. 48, 44 L. ed. 665, the petitioner sought by writ of mandamus to compel one of the District Courts of the United States in the State of Texas to enter a default judgment in a suit against R. G. Dunn & Company, a non-resident partnership, which had been served with summons by service upon a resident agent. This Court, after laboriously reviewing the Texas statutes, held that there was no statute in Texas which authorized this method of serving process and therefore the District Court did not have jurisdiction to render the judgment prayed for. This Court said:

> "It appears by the record, and is not now denied by the petitioner, that the defendants were a partnership. *In the absence of local statute,* no valid judgment can be rendered against the members of a partnership without service upon them."
>
> (Italics are ours.)

In the case at bar, however, we have a statute which authorizes service of process on the agent of a non-resident partnership, and the above case is authority for the validity thereof.

In *Wilson v. Seligman,* 144 U. S., 41, 36 L. Ed., 338, the court holds that a non-resident can agree in advance to accept service of process other than by personal service. This he would do by transacting business in a state where the state statute authorizes substituted service. The court used the following language:

> "There can be no doubt that in this case, as in all other cases, in which a personal liability is sought to be enforced by judicial proceedings and after written notice, the notice must be personally served upon the defendant within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and

> fixed, *unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient.*"

It is submitted that when the partnership of Farson, Son & Company entered the State of Kentucky and appointed an agent therein to conduct business in said state on their behalf the partnership and the members thereof impliedly accepted the provisions of Subsection 6 of Section 51 of the Kentucky Civil Code and by implication assented to service of process upon them according to the provisions of said statute in any suit brought against them growing out of any business transaction conducted by them in Kentucky.

In *Kane vs. New Jersey,* decided December 4, 1916, this Court upheld the constitutionality of a statute much more radical and drastic in its operation then the one under consideration. We shall quote the facts as stated in the opinion:

> "Mr. Justice Brandeis delivered the opinion of the court:
>
> "The New Jersey Automobile Law of 1908 (P. L. 1908, p. 613) provides in substance that no person, whether a resident or non-resident of the state, shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute; *and also that a non-resident owner shall appoint the secretary of state his attorney upon whom process may be served 'in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner.'* * * *
>
> "Kane, a resident of New York, was arrested

> while driving his automobile on the public highways of New Jersey, and tried in the recorder's court. The following facts were stipulated: Kane had been duly licensed as a driver under the laws of both New York and New Jersey. He had registered his car in New York, but not in New Jersey. *He had not filed with the secretary of state of New Jersey the prescribed instrument appointing that official his attorney upon whom process might be served.* When arrested he was on his way from New York to Pennsylvania. The aggregate receipts from license and registration fees for the year exceeded the amount required to defray the expenses of the motor vehicle department, so that a large sum became available for maintenance of the improved roads of the state. Kane contended that the statute was invalid as to him, a non-resident, because it violated the Constitution and laws of the United States regulating interstate commerce, and also because it violated the 14th Amendment. These contentions were overruled, and he was fined $5." (Italics are ours.)

In answer to the contention that the New Jersey statute requiring the non-resident to appoint the secretary of state as his agent upon whom process may be served, was violative of the Fourteenth Amendment, this Court said:

> "The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to non-residents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety. And it is properly exercised in imposing a license fee graduated according to the horse power of the engine. Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140. Several reasons are urged

why that case should not be deemed controlling.

> "1. The Maryland law did not require the non-resident to appoint an agent within the state upon whom process may be served. But it was recognized in discussing it, that 'the movement of motor vehicles over the highways is attended by constant and serious dangers to the public.' (p. 622.) We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of non-resident owners, was essential to public safety. *There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners.*"
>
> (Italics are ours.)

Therefore, if a state may require a non-resident who drives an automobile through the state to appoint the secretary of state as his agent upon whom process may be served, certainly a state may authorize the service of process upon an agent of a non-resident partnership in suits growing out of business transacted by such partnership in this State. We submit that these two proposition are so similar in principle that the New Jersey statute cannot stand unless the Kentucky statute is upheld.

In *Continental National Bank v. Folsom*, 78 Ga., 449, 3 S. E., 269, it appeared that a statute of Georgia provided that in a suit on an attachment bond if the principal be a non-resident it shall be sufficient to serve a copy of the petition and process on the surety, and that the action may thereupon proceed against both principal and surety, and the court held that such a statute became a part of any attachment bond as fully as though it had been expressly set forth in the bond, and that the statute does not deny due process of law.

Statutes similar to the one under consideration have been recognized in the United States, Canada, England, France and Australia, thereby demonstrating that according to accepted ideas it is not oppressive but is consonant with natural justice.

In *Vallee v. Dumergue* (1849), 4 Exch., 290, 18 L. J. Exch., N. S., 398, and *Copin v. Adamson* (1874), L. R., 9 Exch., 345, 43 L. J. Exch., N. S., 161, 31 L. T., N. S., 242, 22 Week. Rep., 658, it was held that a shareholder of a French company, who was neither a resident of, nor domiciled in, France, was bound by a judgment rendered against him on process served in the manner prescribed by a French statute respecting rights and liabilities of shareholders of such companies. In the former case the court said:

> "*It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.*"

(Italics are ours.)

In *Bank of Australasia v. Nias* (1851), 16 Q. B., 717, 20 L. J. Q. B. N. S., 284, 15 Jur., 967, it was held that the colonial legislature of New South Wales had authority to pass an act providing that a banking company should sue and be sued in the name of its chairman, and that execution on any judgment against the company might be issued against the property of any member in like manner as if such judgment had been obtained against such member personally. The court also held that an action of assumpsit could be maintained against a member of the company who was not served otherwise than by the service on the chairman.

On the question of implied assent the above cases seem to us to be strictly in point, as do also the long line of decisions of the United States Supreme Court to the effect that insurance companies, corporations and even the stockholders of corporations, engaging in business in states other than that of their creation, impliedly assent and are bound by the laws of such state providing a mode for service of process on them and fixing the liability of stockholders in such corporations. (See *Thomas v. Matthiessen,* 234 U. S., 221, 58 L. Ed., 577; *Mutual Reserve Fund Life Assn. v. Phelps et al.,* 190 U. S., 147, 47 L. Ed., 987.) In the Matthiessen case, *supra,* a stockholder of an Arizona corporation was held to have assented to the stockholder's liability imposed by the Statute of the State of California merely by assenting to in spite of the fact that the charter of the corporation expressly provided that the stockholder should not be so bound. We wish to make it entirely plain that the above case and the line of cases of which it is typical, are at the moment cited only upon the question as to the assent on the part of Farson, Son & Company to the method of service provided by the Kentucky Civil Code, by their act of entering the State of Kentucky and engaging in business there. We assume that the same principles of contract apply both to corporations and individuals. The fact that a corporation might be *excluded* from a state does not affect this particular point, for we believe it to be entirely clear that while a citizen of any state of the United States may have a right to engage in business in any other state, yet he must do so subject to all valid laws of such state.

From the foregoing, we submit the Subsection 6 of Section 51 of the Kentucky Civil Code does afford due process of law, and when defendants carried on business in that State and appointed an agent therein, they thereby consented that process may be served upon that agent in suits growing out of the business transacted in such state. The courts of Illinois erred, therefore, in holding said Kentucky Statute unconstitutional, and they should have given to the judgment of the Kentucky Court that full faith and credit which is guaranteed to it by the Constitution of the United States.

II.

THE PROVISION OF THE KENTUCKY CIVIL CODE IN QUESTION DOES NOT DENY EQUAL PRIVILEGES AND IMMUNITIES TO THE CITIZENS OF THE SEVERAL STATES WITHIN THE PROHIBITION OF THE FEDERAL CONSTITUTION.

By its terms this provision applies only to "an individual *residing* in another state, or a partnership, association or joint stock company, the members of which *reside* in another state." Residence bears a direct relation to the practicability and expediency of the method of serving process. The classification of persons to whom the above provision is applicable is based entirely upon the absence of residence in the state and the consequent inaccessibility of such persons for the purpose of serving process. Neither race, color nor *citizenship* is material upon the question of the applicability of this statute. If a citizen of Kentucky resides beyond the limits of Kentucky, the statute applies. If he resides within Kentucky, the statute does not apply to him. If a citizen of Illinois, or any other state, resides within the State of Kentucky, the statute is not applicable to him, but if he resides beyond the limits of Kentucky, the statute is applicable to him.

There is a well-defined legal difference between a resident of a State and a citizen of a State. As stated in the dissenting opinion of *Blake, et al., v. McClung, et al.*, 172 U. S. 239, 43 L. Ed. 432:

> "It is not necessary in this court to refer to the difference between residence and citizenship. Neither is synonymous with the other, and neither includes the other. A British subject or a citizen of Ohio may be a resident of Tennessee and entitled to the benefit of this statute. A citizen of Tennessee may, like these plaintiffs in error, be a resident of and not entitled to its benefit."

In the above case a Tennessee statute was attacked as denying equal privileges and immunities to citizens of other States. The statute reads as follows:

> "Creditors who may be residents of this State shall have a priority in the distribution of assets."

The court, as shown above in the dissenting opinion, stated that the clause of the Federal Constitution in question had no application because the statute operated upon both citizens of Tennessee and citizens of other States, and the only qualification necessary to entitle a person to its benefits was that the person should be a *resident* of Tennessee. The foundation for the majority rule in that case was that the legislative intent in passing the statute was to make it applicable only to citizens of Tennessee. The majority opinion, however, does not affect the principle as to the legal differentation between citizenship and residence.

To the same effect is *Conner v. Elliott,* 59 U. S. 591, 15 L. Ed. 498.

The same principle is applicable to the Kentucky statute in question. It operates both upon citizens of Kentucky and citizens of Illinois, and provides that citizens of Kentucky who reside elsewhere but are doing business in Kentucky may be served with process upon the agent whom they have in charge of their business in Kentucky.

In *Conner v. Elliott,* with reference to the clause of the Federal Constitution which we have under discussion, the court said:

> "* * * according to the express words and clear meaning of this clause no privileges are secured by it except those which belong to citizenship."

As a matter of authority we find that this contention was thoroughly considered and held untenable by the highest court of Kentucky, in the case of *Guenther v. American Steel Hoop Co.,* 116 Ky., 580. The Court of Appeals of Kentucky in that case said:

> "We cannot see that Section 2 of Article 4 of the Constitution of the United States has any application. As shown, the statutes of the state allow subsituted service of process on other classes of persons than non-residents of the state. The

> rights and privileges guaranteed to the citizens of the states by the Federal Constitution are their fundamental rights as citizens. What rights the guaranty includes the Supreme Court has declined to define, but legal remedies may be allowed against those who are domiciled without the state which are not allowed against those who are domiciled within it. Thus, in Cooley on Constitutional Limitations (6th Ed.), 490, after pointing out certain rights that are included, it is said: 'But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon the actual residence; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the state, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the state, notwithstanding such process is not admissible against a resident.' So it is held that a statute requiring security for cost from non-resident plaintiffs suing in the state is valid. Id., p. 25, note; 19 Ency. of Pleading and Practice, 344, and cases cited.
>
> Under these principles the legislature of any state may classify litigants according to the impracticability of obtaining personal service of process, and authorize substituted service when necessary to the administration of justice. This right of the states seems to be expressly recognized by the Supreme Court in *Pennoyer v. Neff*. We, therefore, conclude that the statute is not invalid, and that the motion to quash the process was properly overruled."

The Supreme Court of the United States has also expressly held that the Federal Constitution is not violated by a statute which provides a different mode of service for non-residents than is provided for the residents of a state. The case to which we refer is *Ballard v. Hunter,* 204 U. S., 242, 51 L. E., 462. The facts appear in the opinion of the court, from which we quote:

> "The assignments of error present the contention that plaintiffs in error have been deprived of their property without due process of law. One of them urges, in addition, the clause of the 14th Amendment which prohibits a state from making or enforcing any law which will abridge the privileges or immunities of citizens of the United States, and from depriving any person within her jurisdiction of the equal protection of the laws. Plaintiffs in error invoke those provisions against the statutes of Arkansas, because of the different manner and time of service of summons of the suit authorized by said statutes to enforce the payment of the levee taxes. *It is contended that, by requiring personal service of summons upon resident owners or occupants of lands for at least* 20 *days before the rendition of the decree of sale, and providing for constructive service by publication upon non-resident owners of only four weeks, a discrimination is made between owners of lands, and that non-resident owners are thereby denied the rights secured to them by the Constitution of the United States. We have no doubt of the power of the state to so discriminate, nor do we think extended discussion is necessary.* Personal service, upon non-residents is not always within the state's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. *Huling v. Kaw Valley R. & Improv. Co.,* 130 U. S., 559, 32 L. Ed., 1045, 9 Sup. Ct. Rep., 603. This accountability of the land and the knowledge the owners must be

presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service. Certainly it was not so insufficient that it can be said that a difference in the time allowed for such service was not the equivalent of that allowed to resident owners. * * *

In passing upon the other contentions of plaintiffs in error we are brought to the consideration of *what is due process of law.* A precise definition has never been attempted. It does not always mean proceedings in court. *Den ex dem. Murray v. Hoboken Land & Improv. Co.,* 18 How., 272, 15 L. Ed., 372; *McMillen v. Anderson,* 95 U. S., 37, 24 L. Ed., 335. *Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. Dent v. W. Va.,* 129 U. S., 114, 32 L. Ed., 623, 9 Supt. Ct. Rep., 231; *Lent v. Tillson,* 140 U. S., 316, 35 L. Ed., 419, 11 Sup. Ct. Rep., 825; *Hager v. Reclamation Dist., No. 108,* 111 U. S., 701, 28 L. Ed., 569, 4 Sup. Ct. Rep., 663; *Iowa R. C. Co. v. Iowa,* 160 U. S., 389, 40 L. Ed., 467, 16 Sup. Ct. Rep., 344. * * *

In discussing the contention of plaintiffs in error, that they had been denied the equal protection of the laws by the different manner of service upon resident and non-resident owners of land, and the different times for appearance after service, we declared that it was competent for the state to make the distinction, and that the notice and time were adequate to give the plaintiffs in error the equal protection of the laws. They were also adequate to afford due process of law."

(Italics are ours.)

While the above case, *Ballard v. Hunter,* was a proceeding *in rem.* (involving the title to real property), it is none the less entirely in point as to the permissibility of providing different modes of serving process, based solely upon a difference in *residence* of the persons to be served. In other words, the case squarely holds that a state may provide one method for service upon a non-resident and a different method for serving process upon a resident, and that in so doing the Constitution of the United States is not violated.

We are not citing this case as an authority to the effect that the statute in question is valid, so far as the objection of "due process" is concerned, but only on the point that it does not discriminate between the citizens of the different states.

It is also well settled that equal protection cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated. *Walston v. Nevin,* 128 U. S., 587, 32 L. Ed., 544; *Hayes v. Missouri,* 120 U. S., 68, 30 L. Ed., 578.

Therefore, for the foregoing reasons we respectfully submit that Subsection 6 of Section 51 of the Kentucky Civil Code does not deny equal privileges and immunities to the citizens of the several states, and so far as that objection is concerned, clearly does not violate the Federal Constitution.

III.

WASHINGTON FLEXNER WAS AN AGENT WITHIN THE CONTEMPLATION OF THE KENTUCKY CIVIL CODE ON WHOM PROCESS AGAINST THE DEFENDANTS COULD BE SERVED IN THE KENTUCKY SUIT.

This question was raised by the sixth and seventh pleas, the sixth plea denying the agency of Washington Flexner as to each of the defendants and the seventh plea denying the agency as to John A. McElroy (the judgment being joint).

Neither of these pleas denies the following allegations of the declaration: That Washington Flexner was the agent of defendants at the time of the transaction with the plaintiff out of which the Kentucky suit arose; that he was the agent who represented them in that transaction; and that at the time of such transaction they were non-residents of Kentucky doing business in the State of Kentucky as a partnership under the name of Farson, Son & Company. Each of these pleas allege only that *at the time the Kentucky suit was commenced* and subsequent thereto Washington Flexner was not the agent of defendants. The declaration also alleged that subsequent to the transaction with plaintiff the defendants had appointed and had no other agent in Kentucky and that under the laws of Kentucky Washington Flexner remained the agent of defendants on whom process might be served in a suit arising out of that transaction.. It therefore appears that neither of these pleas denies any allegation of the declaration; they merely deny that the Kentucky law is as stated in the declaration.

In the case of *Nelson Morris & Co. v. Rekkopf & Sons*, 25 Ky., 352, the highest court of the State of Kentucky has construed Subsection 6 of Section 51 of the Kentucky Code and has held that an agent in charge of the business of a non-resident partnership who, on behalf of such partnership, has conducted a transaction in the State of Kentucky, remains the agent of such partnership on whom service of process can be had in a suit against such partnership arising out of that transaction. In that case it appeared that Nelson Morris & Co., a non-resident partnership, had wired to one Clark, a broker in Kentucky, their prices on hides, and that he, as representative of Nelson Morris & Co., sold the hides to the plaintiff in that suit. It did not appear that Clark ever represented the appellants in any other transaction. The suit was brought upon the particular transaction above referred to and process against the defendants Nelson Morris & Co. was served on the said Clark as their agent. The Kentucky court held the service good, and said:

> "The only question being whether the summons was properly served on the defendant, the court may look to the whole record to ascertain that fact. This brings us to what seems to be the real question in the case. Were the defendants engaged in business in this state, and was Clark the manager or agent of, or person in charge of, such business in this state within the meaning of the statute? It is shown by the evidence heard on the trial that Nelson Morris & Co. wired to Bransford Clark, who was a broker at Paducah, Ky., their prices on hides, and he, with these quotations of prices, sold the hides in controversy to appellees in Paducah, as the representative of appellants, forwarding appellees' order to appellants, who accepted it and filled it, the order being subject to their approval. The business was done in Kentucky. It was done by Bransford Clark, by whatever name he may designate his business, was in fact the agent of appellants. The business was carried on in Paducah, and the cause of action sued on arose out of this transaction. *As to this transaction*, appellants were engaged in business in this state, and Bransford Clark was their agent in charge of the business within the meaning of the statute. The court, therefore, properly sustained the attachment, and subjected the fund in court to the debt."

That case fully illustrates the contention of appellant here that process in the Kentucky suit was properly served on Flexner as agent of defendants, since that suit arose out of a transaction (in Kentucky) which it is conceded that Flexner conducted as agent of defendants; and that this is true, although the defendants may have attempted to terminate the agency and may have thought they had succeeded in so doing.

In the case of *International Harvester Co. v. Commonwealth,* 147 Ky., 664, the Kentucky court again said:

> "A single sale negotiated by a special agent for that particular instance, renders the selling agent the agent of the non-resident seller for the service of summons in a suit concerning that particular transaction, *although he might not be for a different transaction. Nelson Morris & Co. v. Rekkopf Sons,* 25 Ky. Law Rep., 352, 75 S. W., 203."

The courts of Illinois have given full recognition to this principle in the case of *Firemen's Insurance Co. v. Thompson,* 155 Ill., 204, 46 Am. St. Rep., 355. While that case involved service on a *corporation,* the decision is, nevertheless, squarely in point on the question now before the court. The point considered in that case was not the *power* of a Wisconsin court to serve summons against an Illinois corporation by serving same upon an agent in Wisconsin, but involved the question of *fact* whether the person served was an agent of defendant on whom process could be served. It appeared that the insurance company, an Illinois corporation, had issued a policy of insurance on certain property in Wisconsin, and that the suit in question was brought in Wisconsin to recover a loss suffered under that policy. Process in the Wisconsin suit was served upon one Tuttle, who it appeared was a member of a firm of insurance agents doing business in Oshkosh, Wisconsin. That firm had received from the plaintiff the application for the insurance policy, and had forwarded same to a firm of insurance brokers in the City of Chicago, who, in turn, had applied to the insurance company for the policy. The service of process of the Wisconsin court was in accordance with a Wisconsin statute which provided as follows:

> "Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance, or a policy of insurance, to or from any such corporation, or who makes any contract of insurance, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertising to do any such thing, shall be held an agent for such corporation to all intents and purposes, and the word 'agent,' whenever used in this chapter, shall be construed to include all such persons."

A judgment was rendered against the company in Wisconsin, and the Illinois suit brought to enforce the same in Illinois. The company attacked the judgment on the ground that the Wisconsin court did not have jurisdiction over it at the time the judgment was rendered. This court said (p. 208-209):

> "We are not prepared to say that the Circuit Court of Wisconsin erred in finding the jurisdictional facts as it did. Certainly, sufficient of the transaction came to the knowledge of appellant to put it upon inquiry in respect of location of the risk and of the assured. By taking a risk within the State of Wisconsin it voluntarily submitted

> itself to the laws of that state. If the recitals in the record of that court are to be taken, as they must, since their truthfulness is not questioned, as true, they afford conclusive evidence of the facts essential to jurisdiction. (*Van Matre v. Sankey,* 148 Ill., 536-554; 39 Am. St. Rep., 196), and if the decisions of the court of last resort of that state are to be, as they must, regarded as binding upon us in respect of the construction to be placed upon the statute above quoted, it necessarily follows that the judgment will, unless attacked for fraud, be held valid and conclusive upon the parties and privies until reversed or set aside in the jurisdiction where rendered. Under such circumstances we are required to give the proceeding in that court full faith and credit. Jurisdiction of the person of the appellant was obtained by due service upon a party declared by statute to be its agent for that purpose, and the court found that such a party performed the acts named in the statute which were necessary to constitute him such agent, and no attempt was made by appellant to have this judgment set aside or reversed in the courts of that state. The court found, specifically, the facts necessary, under the statute, to give it jurisdiction of appellant upon the service had, and that it had jurisdiction of the subject-matter if of the person of appellant, as we have seen it had, is not questioned. This being so, it is manifest that the judgment is entitled to have the same credit validity and effect in this state which it has in the state where rendered. Whatever pleas would be good to a suit on the judgment in that state and no others can be pleaded in the courts of this state. (*Lawrence v. Jarvis*, 32 Ill.. 304, and cases cited; *Hampton v. McConnell,* 3 Wheat., 234.)"

It is, we think, well settled that the construction placed upon a statute of a state by the highest court of that state will be recognized as controlling in the courts of other states. Mr. Justice Brewer speaking for the

Supreme Court of the United States in *Mutual Reserve Fund Life Assn. v. Phelps et al.*, 190 U. S., 147, 47 L. Ed., 987, a case involving the construction of a Kentucky statute, said:

> "Such decision of the highest court of Kentucky construing one of its own statutes, if not controlling upon this court, as very persuasive, and it certainly is controlling unless it be held to be merely an interpretation of a contract created by the statute."

In *Firemen's Insurance Co. v. Thompson, supra,* the Supreme Court of Illinois followed without question the construction placed by the courts of Wisconsin in the interpretation of the statute involved authorizing service.

We respectfully submit that the construction of the Kentucky Civil Code adopted by the Supreme Court of Kentucky should be recognized as authoritative and be followed in this proceeding, and that service of process was rightly had in the Kentucky suit on Washington Flexner under the terms of that statute as construed by the Kentucky court.

It is therefore respectfully submitted that pleas VI and VII (Tr. of R., pp. 28-29) present no defense and the demurrer thereto should have been sustained.

CONCLUSION.

We concede that there is a division of authority on the constitutionality of statutes similar to the one under consideration, but when Your Honors come to analyze the cases it will be found that the decisions of this court and logic and reason support the validity of the Kentucky statute. The cases contra to its validity have not given the question the deep consideration which its importance requires. They have not analyzed the broad significance of the Fourteenth Amendment and its adaptability to the commercial development and progress of this country. A proceeding which may have been regarded as oppressive and arbitrary prior to the invention of the telegraph and rapid transit on our railroads can now be regarded as reasonable and just. Large business partnerships frequently find it necessary to conduct their business in the several states and establish therein branch offices and places of business which are necessarily under the management of some responsible and trusted agent. One of these branches the defendants established in the State of Kentucky. It transacted business with our citizens, and enjoyed the full protection of the laws of the State of Kentucky in so doing. They entered into solemn contracts and business transactions with our citizens, through agents of their own selection. Yet when they have acted in bad faith in making such contracts, and when they subsequently breached the same, they deny that such wrongs can be redressed in the state where the contract was made and breached, and insist that the agent who represented them and was their chief agent in the State in transacting their business should not be made to represent them in accepting service of process in a suit growing out of the business which he transacted in their behalf; that while they enjoyed the protection of our laws yet they did not thereby subject themselves to such laws for the purpose of redressing wrongs which they had committed, but that we must search them out, even to the furthermost parts of the earth, and there sue them where they can be personally served with summons. With which side does the "natural justice" of the case lie? Does it lie in requiring us to go even to far distant lands to sue these defendants, or does it not require that we be permitted to sue them where the contract was made and breached, where they transacted business through an agent of their own selection? Is it unjust to permit service of summons to be made on such an agent, and is it improbable that they will receive through such agent notice that suit has been brought against them? Such a mode of service has not resulted in hardships against corporations and necessarily they are served with process in each instance through their agents. If such mode of service is not oppressive as to corporations, it is not oppressive as to partnerships. If it gives reasonable notice to corporations, it should be the same as to partnerships. This is all the Constitution requires. Partnerships such as R. G. Dunn & Co. and Adams Express Company operate in almost every important city in the United States. Is it possible that citizens of Kentucky are compelled by the Constitution of the United States to search out the members of such partnerships, even though they may be in New Guinea or Siberia before they can bring the members of such partnerships before any court? To so hold means that they are practically immune from suit.

We believe that this Court will see that business conditions in this country not only justify the enactment of such a statute but proper safeguards for litigants of the various states demand it. It is neither arbitrary nor oppressive but is eminently fair and just to all the parties concerned. If for any reason defendants should not be apprized of the pendency of a suit brought against them through service of process on their agents, they are abundantly protected by the laws of Kentucky. As was said in *Guenther vs. American Steel Hoop Co.*, supra:

> "If notice of the action does not in fact reach the defendant, ample remedy is also provided by the Code for the granting of new trials, where, from unavoidable casualty or misfortune, the party is prevented from hearing or defending. Code, Sec. 518, *McCall v. Hitchcock*, 9 Bush, 66."

We believe that when Your Honors come to consider this statute in the light of the real meaning of the Fourteenth Amendment, you will hold that it is not contrary to natural justice and therefore violates no provision of the Federal Constitution.

We ask that the judgment of the Supreme Court of the State of Illinois be reversed with instructions to that Court to give full faith and credit to the judgment rendered by the Circuit Court of Jefferson County, Kentucky.

Respectfully submitted,

Jos. S. Laurent

Ralph D. Stevenson

Counsel for Plaintiff in Error.

(September 20, 1917)

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Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. [redacted] 101

BERNARD FLEXNER,
Plaintiff in Error,

vs.

JOHN FARSON, JR., WILLIAM FARSON (DEFENDANT IN ERROR), AND JOHN A. McELROY, DOING BUSINESS AS PARTNERS UNDER THE NAME AND STYLE OF FARSON, SON & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HARRY P. WEBER,
GEORGE W. MILLER,
Counsel for Defendant in Error.

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Pennoyer v. Neff, 95 U. S., 714 .... 12, 48
Vallee v. Dumerque, 4 Exch., 290 50
Wilson v. Seligman, 144 U. S., 41 .... 13, 15

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 367

BERNARD FLEXNER,
Plaintiff in Error,
vs.
JOHN FARSON, JR., WILLIAM FARSON (DEFENDANT IN ERROR), AND JOHN A. McELROY, DOING BUSINESS AS PARTNERS UNDER THE NAME AND STYLE OF FARSON, SON & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT.

MAY IT PLEASE THE COURT:

Plaintiff in error was plaintiff in the Kentucky suit as well as in this suit and defendant in error was one of the defendants in both suits. As it will be necessary from time to time to refer to defendant in error in connection with his codefendants, we will for convenience designate plaintiff in error as plaintiff and defendant in error as defendant as was done in the brief for plaintiff in error.

Farson, Son & Co. is a copartnership engaged in the business of bond brokers. In 1911 this firm was composed of John Farson, Jr., William Farson and John A. McElroy. William Farson was and still is a resident and citizen of Illinois and the other two were and still are residents and citizens of New York. None of them ever was a resident or citizen of Kentucky. In 1911 Washington Flexner acting as agent for Farson, Son & Co. sold some bonds to Bernard Flexner, the plaintiff, in Kentucky. Shortly thereafter John A. McElroy withdrew from said firm and has had no connection with it since. Still later a suit was brought in Jefferson County, Kentucky, by plaintiff against the firm of Farson, Son & Co. alleged to have been composed of John Farson, Jr., William Farson and John A. McElroy, to recover the purchase price of the bonds on account of a failure to carry out the alleged terms of the contract of purchase. No personal service was had on any of the parties alleged to have composed said firm, nor did any of them enter their appearance or take any action toward submitting themselves to the jurisdiction of the Kentucky court. A summons was issued commanding the sheriff to summon "Farson, Son & Co., a partnership composed of John Farson, Jr., William Farson and John A. McElroy" which appears from a transcript of the record filed in this cause. (Tr. of Rec., 21.) This summons shows the following return. "Executed Oct. 7, 1913, on Farson, Son & Company, a partnership composed of John Farson, Jr., William Farson and John A. McElroy by delivering a copy of each of the within summons to Washington Flexner, agent for Farson, Son & Company." (Tr. of Rec., 21.) This service was made pursuant to Subsection 6, Section 51 of the Kentucky Code which is set out in plaintiff's statement. On this service the Kentucky court entered a judgment *in personam* against the three parties alleged to have composed said firm.

This suit was brought in the Circuit Court of Cook

County, Illinois, against the same three parties to enforce this judgment. Service was had on William Farson only. He filed eight pleas seven of which attack the jurisdiction of the Kentucky court for various reasons as set forth on pages 4 and 5 of plaintiff's statement. Plaintiff demurred generally to these pleas which was overruled. Whereupon plaintiff elected to stand by his demurrer and a judgment *nil capiat* was entered, from which an appeal was prayed to the Supreme Court of Illinois, where the judgment was affirmed.

This case does not call for a determination of the validity of the Kentucky statute for purposes of service in actions *in rem*, nor does it necessarily call for a determination of whether a Kentucky court could lawfully enforce the judgment in that state, although that point may be incidentally involved. The question to be decided is can this judgment obtained on the service had upon Washington Flexner be enforced in Illinois? We contend that this question should be answered in the negative because:

1st. It was not obtained by due process of law.

2nd. Defendant and his codefendants were denied equal privileges and immunities with citizens of Kentucky.

3rd. Washington Flexner was not an agent, manager or person in charge of the business of defendant in Kentucky, when the suit was started and service had.

4th. Washington Flexner was not an agent, manager or person in charge of the business of John A. McElroy, a joint obligor with defendant, in Kentucky when the suit was started and service had.

5th. The service purports to have been made upon Farson, Son & Co. only, of which firm John A. McElroy was not a member at the time of service and no service purports to have been made upon him individually.

BRIEF OF POINTS AND AUTHORITIES.

I.

DEFENDANT DID NOT WAIVE CONSTITUTIONAL RIGHTS.

Defendant transacted business in Kentucky as a matter of right under the Constitution of the United States and did not thereby submit or consent to any condition imposed by that state which was not likewise imposed upon citizens of Kentucky generally. (Arg., p. 10 to 15.)

Caldwell v. *Armour,* 43 Atl., 517, 518.
Cabanne v. *Graf,* 92 N. W., 461, 462.
Moredock v. *Kirby,* 118 Fed., 180, 186.

The rule as to foreign corporations does not apply as to nonresident individuals. (Arg., p. 15.)

Defendant was entitled to equal privileges and immunities with citizens of Kentucky generally instead of with the few who may reside beyond its limits while conducting business within its limits. (Arg., p. 17.)

Moredock v. *Kirby, supra,* p. 182.

Kentucky Civil Code provides another mode of service for its citizens who are absent from the state. (Arg., p. 17.)

Section 56, Kentucky Civil Code (Abst., 21).

II.

PERSONAL SERVICE OR ENTRY OF APPEARANCE NECESSARY TO SUPPORT A JUDGMENT IN PERSONAM.

(a) Personal service means service on the defendant in person within the jurisdiction of the court. (Arg., p. 21.)

19 Ency. of P. & P., 613.

Black's Law Dictionary (2nd Ed.), 1076.
3 Bouvier's Law Dictionary (3rd Rev.), 2577.
Thisler v. *Little,* 121 Pac., 123; 86 Kans., 787.
Dalton v. *Railway Company,* 87 S. W., 610, 612; 113 Mo. App., 71.
McKenzie v. *Boynton,* 125 N. W., 1059, 1062; 19 N. D., 531.
Moyer v. *Cook,* 12 Wis., 372.

Substituted or constructive service is not personal service. (Arg., pp. 22 to 45.)

Black's Law Dictionary (2nd Ed.), 1076, 1118.
3 Bouvier's Law Dictionary (3rd Rev.), 3048, 3173.

(b) Nothing short of personal service within the jurisdiction or entry of appearance would give the Kentucky court jurisdiction to enter a judgment *in personam* enforceable in Illinois. (Arg., p. 22.)

2 Black on Judgments, Sec. 906.
2 Freeman on Judgments, Secs. 564, 566.
D'Arcy v. *Ketchum,* 11 Howard, 165; 13 L. Ed., 648.
Pennoyer v. *Neff,* 24 L. Ed., 565, 570; 95 U. S., 714.
Caldwell v. *Armour et al.,* 43 Atl., 517.
Cabanne v. *Graf,* 92 N. W., 461.
Moredock v. *Kirby,* 118 Fed., 180, 184, 185.
Grover v. *Radcliffe,* 137 U. S., 286, 297.
Brooks v. *Dun,* 51 Fed., 138, 147.
Blessing v. *McLinden,* 79 Atl., 347.

A judgment *in personam* rendered without personal service within the jurisdiction or entry of appearance is not entitled to full faith and credit in other states. (Arg., pp. 23 to 45.)

2 Black on Judgments, Sec. 906.

2 Freeman on Judgments, Secs. 564, 566.
Baker v. *Baker,* 242 U. S., 394, 400 *et seq.*
D'Arcy v. *Ketchum, supra,* page 174.
Pennoyer v. *Neff, supra,* page 570.
Grover v. *Radcliffe, supra,* pp. 294, 297.
Louisville & N. R. R. Co. v. *Nash,* 118 Ala., 477; 41 L. R. A., 331.

Such a judgment deprives the defendant of the due process of law guaranteed to him by the Constitution of the United States. (Arg., pp. 28 to 45.)

Pennoyer v. *Neff, supra,* page 572.
Caldwell v. *Armour et al., supra,* page 520.
Cabanne v. *Graf, supra,* page 461.
Baker v. *Baker, supra,* p. 401 *et seq.*
Louisville & N. R. R. Co. v. *Nash, supra.*
Ashland Exchange Bank v. *Wiley,* 195 U. S., 257; 49 L. Ed., 184.
Blessing v. *McLinden,* 79 Atl., 347.

Such a judgment denies to the nonresident defendant the equal privileges and immunities with the citizens of the state of the forum guaranteed to him by the constitution of the United States. (Arg., pp. 33 to 40.)

Caldwell v. *Armour, supra,* page 520.
Cabanne v. *Graf, supra,* page 461.
Moredock v. *Kirby, supra,* p. 181 *et seq.*

Courts will refuse to enforce judgments *in personam* entered in sister states upon service had on nonresidents under statutes similar to the one involved in the case at bar. (Arg., pp. 25, 26, 27, 45, 46.)

D'Arcy v. *Ketchum, supra.*
Louisville & N. R. R. Co. v. *Nash, supra.*

And federal courts sitting in the same state where the service was made or the judgment rendered have refused to sustain them. (Arg., pp. 37 to 40.)

Pennoyer v. *Neff, supra.*
Moredock v. *Kirby, supra.*
Brooks v. *Dun, supra.*

Even courts of the state where such service is made upon a nonresident in an action *in personam* will quash the service or set aside any judgment which may have been entered. (Arg., pp. 33 to 39; 45.)

Caldwell v. *Armour, supra.*
Cabanne v. *Graf, supra.*

This court is not bound by the rulings of the Supreme Court of Kentucky. (Arg., p. 47.)

Grannis v. *Ordean,* 234 U. S., 385, 394.

A partnership is not a legal entity distinct from the individuals composing it. (Arg., p. 48.)

Abbott v. *Anderson,* 265 Ill., 285, 290.
Francis v. *McNeal,* 228 U. S., 695.

III.

THE SIXTH AND SEVENTH PLEAS PRESENT AN ISSUE OF FACT AS TO THE AGENCY OF WASHINGTON FLEXNER.

The Kentucky statute provides for service on an agent acting as such at the time suit is brought. (Arg., p. 51.)

The theory of the second amended declaration is that Washington Flexner was defendants' agent at the time suit was commenced. (Arg., p. 51.)

In this action the laws of Kentucky are facts which must be pleaded and proven on the trial. (Arg., pp. 51, 52.)

Edwards v. *Schillinger,* 245 Ill., 231, 243.

Hoes v. *Van Alstyne,* 20 Ill., 201, 203.
Marshall v. *Coleman,* 187 Ill., 556, 582.
L. N. A. & C. Ry. Co. v. *Shires,* 108 Ill., 617, 628.

Ultimate facts only are proper in pleading.
McAlister v. *Kuhn,* 96 U. S., 87, 89.

The ultimate fact therefore was whether Washington Flexner was the agent of defendants at the time the suit was brought and service was had. (Arg., p. 52.)

The sixth and seventh pleas squarely traverse this ultimate fact following the language of the statute in so doing. (Arg., p. 52.)

The allegation of the declaration as to the effect of the Kentucky law on the question of agency is merely inducement and need not be traversed separately. (Arg., pp. 52, 53.)
Stephen on Pleadings (9th Am. Ed.), 243.
Graham v. *Dixon,* 3 Scam. (Ill.), 115.
People v. *Strawn,* 265 Ill., 292, 297.

This is a pure question of pleading and what the fact as to agency under Kentucky law may prove to be is not now important. The demurrer admits the facts as alleged in the pleas. (Arg., p. 53.)

IV.

THE FIFTH PLEA IS A PROPER PLEA.

The Kentucky judgment is joint and if not good as to all is not good as to any of the defendants. (Arg., p. 54.)
Claflin v. *Dunne,* 129 Ill., 241, 248.
W. C. St. Ry. Co. v. *Martin,* 154 Ill., 523, 526.
Supreme Lodge K. of H. v. *Goldberger,* 175 Ill., 19.

The return of the Kentucky sheriff shows that service was had on Farson, Son & Co., a partnership by delivering copies to the agent for Farson, Son & Co. (Arg., p. 54.)

If any one of the defendants was not then a member of Farson, Son & Co., the return does not show service on such individual. (Arg., p. 54.)

The liability of such individual as a former partner does not dispense with service upon him as an individual in the first instance before such liability is determined. (Arg., p. 55.)

The fifth plea denying partnership of all defendants therefore raised an issue of fact going to the jurisdiction of the Kentucky court. (Arg., p. 55.)

Where several distinct pleas are pleaded in bar of the whole action and a demurrer is overruled as to any one of them and plaintiff elects to stand by his demurrer, defendant is entitled to judgment regardless of the other issues. (Arg., pp. 55, 56.)

Ward v. *Stout*, 32 Ill., 399, 410.
Mt. Carson, C. & R. R. Co. v. *Andrews*, 53 Ill., 176, 184.
People v. *Opera House Co.*, 249 Ill., 106, 112.
People v. *Bug River Drainage Dist.*, 189 Ill., 55, 59.
Weiss v. *Binnian*, 178 Ill., 241, 245.
Olson v. *Mackolite Fire Proofing Co.*, 116 Ill. App., 573, 574.
16 Ency. of P. & P., 567.

ARGUMENT.

I.

DEFENDANT DID NOT WAIVE CONSTITUTIONAL RIGHTS.

In their argument (p. 12) counsel concede that the Kentucky judgment is not entitled to full faith and credit within the State of Illinois unless the Kentucky court had acquired jurisdiction over the person of defendant at the time it rendered the personal money judgment against him and his codefendants. Counsel's position is that by transacting business in the State of Kentucky defendant assented to the mode of service provided by the Kentucky Code. If therefore defendant did not assent to the mode of service employed in the Kentucky suit that should be the end of this case. Counsel do not contend that there was an express assent to such mode of service. The most that they claim is that by transacting business in Kentucky through an agent defendant impliedly assented and agreed that in suits growing out of such business process might be served upon him in the mode provided in Subsection 6 Section 51 of the Kentucky Code.

A foreign corporation may go into the State of Kentucky as a matter of grace only and for that reason must submit to whatever conditions that state sees fit to impose. But a natural citizen of Illinois goes into Kentucky under the Constitution of the United States *as a matter of right* and not as a matter of comity and he is not required to submit to any condition which is not equally imposed upon citizens of Kentucky generally. The rights of an individual in this regard are entirely different from the rights of a corporation. This is clearly held in the following cases:

In *Caldwell* v. *Armour et al.*, 43 Atl. (Del.), 517, defendants went into Delaware where a similar statute was in force and the court said, p. 518:

> "The circumstances under which a natural person, a citizen of another state, carries on business in this state, are essentially different. He carries on business here, not by virtue of the consent of this state, but by virtue of a right secured to him by the Constitution of the United States; *and from the exercise of that right no assent can be implied that he will submit to a mode of service in personal actions different from that provided in case of citizens of this state.*"

In *Cabanne* v. *Graf*, 92 N. W. (Minn.), 461, the court said, p. 462:

> "The court may seize his property within the state by its process, and, upon such reasonable constructive notice to him as the legislature may direct, apply the property to the payment of his debts; but the legislature cannot declare that to be personal service on a citizen of another state, not actually found within the state, which is not so in fact. Such nonresident person, unlike a corporation, carries on business in this state not by virtue of its consent, but by virtue of the federal constitution which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; *hence it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent.* He submits his property which he sends into the state to the jurisdiction of its courts, but not his person."

In *Moredock* v. *Kirby*, 118 Fed., 180, the court said, p. 186:

> "It is also contended that a citizen or resident of another state, who has engaged in business in Kentucky since the passage of the act of 1893, has done so with notice of its provisions, and should be held to have impliedly consented to be subject thereto. His constitutional right to acquire, hold, and enjoy property, or otherwise to engage in business in this

> state, on an equal footing with any citizen of Kentucky, is unquestionable. *It cannot be presumed that such a right would be waived at all,* and certainly not where there was no possible necessity nor consideration for doing so. Indeed, his rights in the premises might be regarded as inalienable; but, whether so or not, anything short of the most express and unequivocal renunciation of them would necessarily be ineffectual. Nothing should be left to implication in such a case. Any implication here would be too shadowy to demand serious consideration."

The above cases are directly in point on this question of implied assent as well as on other questions in this case and will be more fully analyzed hereafter in this argument.

If individuals whether singly or as members of partnerships may go into another state and there do business, or may do business in another state without going there personally, *as a matter of right,* it cannot be said that that state may fix conditions with reference to service of process, etc., under which such individuals or partners may there do business. There is nothing to the contrary in *Pennoyer* v. *Neff,* cited by plaintiff. In that case the dictum upon which counsel rely is to the effect that the court did not mean to assert that a state might not require a nonresident entering into a partnership or association within its limits or making contracts enforceable there *to appoint an agent or representative in the state to receive service of process, etc.* But the State of Kentucky has done no such thing even if it were to be conceded that it has the power. The Kentucky statute in question contains nothing directly or inferentially requiring an individual or a partnership *to appoint* an agent in Kentucky upon whom process may be served as a condition of doing business in that state.

That the statement in *Pennoyer* v. *Neff* relied on by counsel is pure dictum is manifest by the fact that the court said that in that case there was no feature of that kind and "consequently no consideration of what would be the effect of such legislation, in enforcing the contract of a nonresident, can arise. The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."

Guenther v. *American Steel Hoop Co.*, 116 Ky., 580, is relied upon by plaintiff. That case deals with an entirely different situation as we will later point out, but in referring to *Grover* v. *Radcliffe,* 137 U. S., 287, the court said:

> "Further on in answer to the objection that the defendant must be presumed to have contracted in view of the laws of Pennsylvania the court said: 'But we do not think that a citizen of another state than Pennsylvania can be thus presumptively held to knowledge and acceptance of the statutes of the latter state * * *.'"

Counsel call attention to *Wilson* v. *Seligman,* 144 U. S., 41, wherein the court said there could be no doubt that in all cases in which a personal liability is sought to be enforced by judicial proceedings and after written notice, the notice must be personally served upon the defendant *within the territorial jurisdiction of the court* by whose order or judgment his personal liability is to be fixed "unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient." The language just quoted from the opinion is the reliance of counsel. It may well be that a nonresident individual or individuals whether doing business in a state as individuals as contradistinguished from partners or as a partnership who have *agreed in advance* to accept or who do *in fact* accept some other form of process may be held to be bound by a judgment entered against them under such service of process, not because the state has the right to deprive them of their constitutional right to do business in the state in question by forcing such conditions upon them, but because they have agreed to be bound by such service and therefore may well be held to be estopped from denying the jurisdiction of the court. This defendant never made any such agreement in advance of service nor did his codefendants, nor did they ever in fact accept such form of service. But plaintiff's counsel argue that they did business in Kentucky through an agent, *i. e.*, they sold to plaintiff in Kentucky through an agent the bonds in question; that the statute in question was in force at that time, and that therefore they should be held to have impliedly agreed that the Kentucky courts could acquire jurisdiction of them in proceedings *in personam* by service upon the agent.

If this contention of counsel be sound then the citizens of one state do not have a right under the federal constitution to do business in another state. A right in the State of Kentucky to fix conditions under which citizens of Illinois may do business in Kentucky is absolutely inconsistent with the idea of the citizens of Illinois having a constitutional right to do business in Kentucky. If Kentucky has the right to so stipulate, then citizens of Illinois will not do business in Kentucky as a matter of right but as a matter of grace. Such doctrine would put citizens of Illinois and corporations of Illinois upon the same basis in that regard and would be utterly at variance with Sec. 2 of Article IV of the federal constitution, the first clause of which reads:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

In other words, if counsel's contention is right, then it follows that defendant was given his choice of surrendering his constitutional right of due process of law by personal service of summons within the jurisdiction, or of surrendering his constitutional right of transacting business in Kentucky. Under counsel's theory this statute of Kentucky would deprive defendant and his co-defendants of one or the other of these constitutional rights, not by consent but by force.

When an Illinois corporation seeks to do business in Kentucky it must carry on its business subject to such conditions as Kentucky sees fit to prescribe, because a corporation has been held not to be a citizen within the meaning of this clause of the federal constitution, and an Illinois corporation will transact business in Kentucky as a matter of grace or comity, and not of right, but such is not the case with citizens of Illinois whether they seek to do business in Kentucky as individuals or as members of a partnership. Counsel cite no authority which sustains their position in this regard. They point to the dictum in *Pennoyer* v. *Neff* which does not sustain them, while in addition to the clear logic of the situation which of itself should be sufficient to dispose of their contention, *Caldwell* v. *Armour, supra, Cabanne* v. *Graf, supra,* and *Moredock* v. *Kirby, supra,* are directly against them. In their comments on *Wilson* v. *Seligman,* counsel state in connection with the assertion that a nonresident can agree in advance to accept service of process other than by personal service:

> "This he would do by transacting business in a state where the state statute authorizes substituted service."

This quotation from counsel's argument is the statement of counsel and not the holding of the court. *Wilson* v. *Seligman* announces no such doctrine.

In *Alaska Coml. Co.* v. *Debney,* 144 Fed., 1, cited by plaintiff, the court pointed out (p. 7):

> "The only point made against the validity of that judgment is that the service of the claim and summons was made on A. W. Debney, who, it is contended by the defendant and was held by the court below, was not 'an agent, managing clerk, or other representative (of the defendant), resident and carrying on his business within' the Yukon Territory, and therefore not a person upon whom a valid service could, under the Canadian statute, be made."

No question was raised as to Debney's assent to be bound by the law if the agent was one such as was contemplated by the law. Furthermore, when Debney went into Canada he could not rely upon the Constitution of the United States as a guaranty of equal privileges and immunities with the subjects of Canada because the constitution does not extend to that dominion.

In *Continental National Bank* v. *Folsom,* 3 S. E., 269, a national banking corporation located in New York voluntarily went into Georgia and availed itself of the courts of that state to obtain an extraordinary remedy by attachment against one of its citizens. It was "a case where the bank sought the forum or venue to bring a suit itself, and in order to sue there voluntarily gave a bond as a condition precedent to bringing that suit and broke that bond, and is sued for that breach" (p. 270). It was held that (p. 274):

> "A nonresident *artificial* person, seeking the aid of our state tribunals, to enforce demands due to such a person, by resorting to the process it did in this case, would voluntarily bring itself within this jurisdiction, and when once it has submitted itself to such jurisdiction, it could not withdraw without complying with the conditions on which alone it was permitted to enter and avail itself of the extraordinary remedies afforded by our laws."

Obviously this case is not in point.

That *Firemens' Ins. Co.* v. *Thompson,* 155 Ill., 204, is not in point is made manifest by the syllabus which says:

> "An Illinois insurance company, by taking a risk in Wisconsin, voluntarily submits itself to the laws of that state as to service of process upon *foreign corporations.*"

Plaintiff offers the suggestion that defendant is entitled under the constitution with equal privileges and immunities not with the citizens of Kentucky generally, but with that small class of citizens who while retaining their citizenship in the state and are conducting business there actually reside beyond its limits. The same suggestion was made in *Moredock* v. *Kirby, supra,* and was, disposed of in the following language (p. 182):

> "Nor can the rule be changed, and such a result be accomplished, constitutionally, under cover of the very rare exceptions just mentioned of citizens of Kentucky residing out of the state, but continuing to do business here. The constitutional provision deals with the rights of citizens generally, and its operation cannot be contracted by isolated instances."

It will be noted also that the Kentucky civil code provides another mode of service for its citizens who are absent from the state (Sec. 56 set forth in plea VIII, Tr. of Rec., 30), and under such service a *personal judgment is prohibited.* (Sec. 419, Tr. of Rec., 31.) In fact, Section 419 prohibits a personal judgment under any mode of constructive service and is not confined to service under Section 56.

Plaintiff suggests that similar statutes providing for service on nonresident partnerships have been passed in other states and countries. There is such a statute in Illinois known as Section 13 of the Practice Act of 1907. We are not aware that service under this section has ever been the basis of a judgment *in personam* against a nonresident of Illinois. This section was before the Supreme Court of Illinois in *Watson* v. *Coon*, 247 Ill., 414. That was a suit started in DeWitt County against a partnership doing a grain business there but who resided in Champaign County. Service was had on an agent in DeWitt County. Defendants appeared specially and moved to quash the service on the ground that Section 13 of the Practice Act of 1907 provided for service on agents only where the members of the partnership were nonresidents of the state, and insisting on their right to be sued in the county where they resided under authority of Section 6 of the Practice Act. Their motion was overruled and they stood by it. Whereupon judgment was rendered which was affirmed by the Appellate Court and a certificate of importance granted. The Supreme Court affirmed the judgment but did not consider the constitutionality of this statute since it was not raised. The only point raised was the construction of the word "nonresidents." It was held that this word applied to nonresidents of the county. Although there was no question in this case of service on a partnership, nonresident of the state, or whether such a judgment would be *in personam*, yet the court said, p. 417:

> "It must be presumed that the legislature intended to give litigants some substantial and additional right by passing section 13. If, as appellants contend, service can only be had under said section upon the members of a copartnership all of whom are nonresidents of the state, *there would be no substantial difference in proceeding under said section and under our Attachment Act*, which provides a means by which the property of nonresident defendants in this state may be made subject to their debts."

Since proceedings under the Attachment Act are *in rem* it is evident that the court was of the opinion that service under Section 13 would not support a judgment *in personam* against nonresidents of the state.

Since the policy of Illinois is not to give its own citizens a personal money judgment without personal service on nonresident defendants, will a citizen of Kentucky be permitted to come into Illinois and enforce a personal money judgment obtained against a citizen of Illinois without such personal service?

II.

PERSONAL SERVICE OR ENTRY OF APPEARANCE NECESSARY TO SUPPORT A JUDGMENT IN PERSONAM.

Many of the authorities which we are about to cite treat of both the subjects of "due process of law" and "equal privileges and immunities," so that if we may discuss these two subjects together we will avoid the necessity of analyzing the cases more than once.

In *Riverside Mills* v. *Menefee,* 237 U. S., 189, it was said (p. 193):

> "That to condemn without a hearing is repugnanat to the due process clause of the Fourteenth Amendment needs nothing but statement. Equally well settled is it that the courts of one state cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another state when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in *Pennoyer* v. *Neff,* 95 U. S. 714, and has been without deviation upheld by a long line of cases, a few of the leading ones being cited in the margin."

Counsel assert that "due process of law" is an elastic term and must depend for its meaning and application upon the peculiar facts presented in each case where it is involved. This court has said in *McDonald* v. *Mabee,* 243 U. S., 90, that the foundation of jurisdiction is physical power and also that in states bound together by a constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny fair play that can be secured only by a pretty close adhesion to fact.

We believe that service of summons upon a former agent who has ceased to have any connection with defendant or any interest in defendant's business or affairs and who may perhaps be antagonistic to defendant is a denial of fair play. Counsel dwell upon the element of reasonable notice and refer to provisions for serving guardians, and committees of lunatics who are officers of the court usually under bond to secure the faithful performance of their duties. A former agent is not an officer of the court, he is not under bond, he is not a member of the defendant's immediate family and therefore interested in his affairs. Such former agent is an entire stranger to the defendant, under no obligation, and may or may or may not notify the defendant of such service according to his own pleasure or disposition in the matter. It would seem that it would be a dangerous precedent to hold that such service is due process of law.

We submit that the case at bar comes well within the general rule which is stated in *N. Y. Life Ins. Co.* v. *Dunlevy,* 241 U. S. 518, as follows (p. 522):

> "The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person."

Only such judgment is entitled to full faith and credit as is rendered by a court having jurisdiction over the subject matter and the person of the defendant, and such jurisdiction is always open to inquiry in every court where such judgment is sought to be enforced, even though the record recites all the facts necessary to give such jurisdiction.

Thompson v. *Whitman,* 85 U. S., 457.

(a) *Definition of personal service.*

Let us first determine what constitutes personal service.

In 19 Ency. of Pl. & Pr., page 613, it is said:

> "The term 'personal service' is frequently used loosely in contradistinction to service by publication or other constructive service, and in this sense includes service by leaving a copy at the defendant's residence. But strictly speaking service by reading and delivering a copy *to the defendant in person,* or by taking a written acknowledgment from him, *is the only personal service."*

In Black's Law Dictionary (2nd ed.), page 1076, it is said:

> "Personal service of a writ or notice is made by delivering it to the person named, in person, or handing him a copy and informing him of the nature and terms of the original. Leaving a copy at his place of abode is not personal service."

Bouvier's Law Dictionary, third revision, Vol. 3, page 2577, defines "personal service" thus:

> "The delivery of a writ to the person therein named *in person.* Leaving a copy at his place of abode is not personal service."

See also:

Thisler v. *Little,* 121 Pac., 1123 (86 Kan., 787).
Dalton v. *Railway Co.,* 87 S. W., 610, 612 (113 Mo. App., 71).
McKenzie v. *Boynton,* 125 N. W., 1059, 1062 (19 N. D., 531).
Moyer v. *Cook,* 12 Wis., 372.

Black's Law Dictionary (2nd ed.), page 1118, defines "substituted service" as

> "Service of process upon a defendant in any manner, authorized by statute, *other than personal service within the jurisdiction;* as by publication, by mailing a copy to his last known address, or by personal service in another state."

Bouvier's Law Dictionary (3rd rev.), Vol. 3, p. 3173, defines "substituted service" thus:

> "Service of process upon another than the person upon whom it should be made, where the latter is impossible."

Black's Law Dictionary (2nd ed.), 1076, defines "constructive service" thus:

> "Any form of service other than actual personal service; notification of an action or of some proceeding therein, given to a person affected by sending it to him in the mails or causing it to be published in a newspaper."

Bouvier's Law Dictionary (3rd rev.) Vol. 3, p. 3048, says:

> "Substituted service is a constructive service made upon some recognized representative, as where a statute requires a foreign insurance company doing business in the state of Massachusetts to appoint the insurance commissioner of the state their attorney, 'upon whom all lawful processes in any proceeding against the company may be served with like effect as if the company existed in that commonwealth.'"

Substituted service seems to be but a form of constructive service. It is clear, therefore, that whether the service attempted to be had on the defendant in Kentucky be called substituted service or constructive service, *it was not personal service.*

(b) *Necessity of personal service.*

Nothing short of personal service would give the Kentucky court jurisdiction of the defendants in an action *in personam* where the defendants did not appear in person or by authorized attorney. Since there was no entry of appearance by the defendants or by any one authorized to appear for them, the Kentucky judgment must stand or fall upon the service had upon Washington Flexner.

It should be borne in mind that this is an attempt to enforce this judgment against the defendant in Illinois and beyond the territorial limits of Kentucky. It is wholly immaterial in this case what would be the effect of this judgment if it were sought to be enforced in Kentucky.

The following authorities establish beyond question the necessity for personal service to support a judgment *in personam* which will be valid outside of the state in which it is rendered:

Black on Judgments, Vol. 2, Sec. 906.

> "*Constructive service on nonresidents.* A judgment rendered in one state against a resident of another state who was not served with process and did not appear in the action either personally or by an authorized attorney is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode (*e. g.*, publication of summons in a newspaper) recognized as sufficient and valid by the laws of that state; and such absence of jurisdiction will defeat an action on such judgment in any other state (citing numerous authorities in footnote). As remarked by a learned judge in Kentucky, 'although the federal constitution declares in effect, and according to the established interpretation of it here, that a judgment rendered in one of the states of the Union shall be as effectual as it may be where it was pronounced, yet it has been decided that as no state has jurisdiction, legislative or judicial, over any other persons than its own citizens and foreigners within its sovereign limits, a judgment or decree *in personam* against a citizen of another state without actual service of process or voluntary appearance, is not made

binding and conclusive in any other state by the federal constitution' (citing *Whiting* v. *Johnson*, 5 Dana, 390). So also the Supreme Court of the United States declares that a judgment or decree which is merely *in personam* 'can only be supported against a person who is not a citizen or resident of the state in which it is rendered by *actual service upon him* within its jurisdiction, and constructive service by publication in a newspaper is not sufficient. The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes, but no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other state; and it is of no greater force as against a citizen of another state in a court of the United States though held within the state in which the judgment was rendered.' A judgment so rendered therefore will be regarded in other states as void and mere nullity; it may be impeached collaterally or otherwise; it forms no bar to a recovery sought in opposition to it nor any foundation for a title claimed under it."

2 Freeman on Judgments.

Section 564. "It seems to us, then, that the only issue which ought to be tried in any state in regard to the jurisdiction of a court which has rendered a personal judgment in another state is, *Was the defendant, when the suit was instituted, within the state whose court assumed to exercise authority over him? or if without the state, did he submit himself to its authority?* If the issue should be answered in the negative, then the judgment ought to be disregarded, *no matter how positively the record enumerates all needful jurisdictional facts.*"

Again—

Section 566. "We have already shown that *by no means* can a state compel a *nonresident* to come within its limits to answer a complaint in a civil action, and that if it should undertake to do so, the judgment and proceedings would not be recognized beyond its own boundaries as creating any personal

> obligation. But a citizen of one state, upon going voluntarily into another, submits himself to the jurisdiction of the courts of the latter."
>
> SECTION 567. "Personal service being undoubtedly ineffectual to call into being such a personal judgment as will be given extra territorial effect against a nonresident unless the service was made on him within the state, it follows, *a fortiori*, that no greater effect would be produced if the service were constructive instead of personal."

D'Arcy v. *Ketchum*, 11 Howard, 165 (13 L. Ed., 648).

A. H. Gossip & Co., composed of A. H. Gossip and Joseph Calder, a partnership, was doing business in New York. Gossip & Co., composed of George H. Gossip and James D'Arcy, a partnership, was doing business in Louisiana. A. H. Gossip & Co. drew a bill of exchange upon Gossip & Co., which was accepted. Later Ketchum, Rogers and Bement brought an action in the Superior Court of New York against the drawers and acceptors of this bill. They were sued jointly. The opinion states that process was served upon George H. Gossip in New York. He appears to have been a resident of New York. D'Arcy was not served and did not appear. George H. Gossip did appear and later pleaded the general issue and gave notice of set-off.

A New York statute provided that (p. 173)

> "where joint debtors are sued, and one is brought into court on process, he shall answer the plaintiff; and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court."

Judgment was rendered jointly against both Gossip and D'Arcy by the New York court.

Suit was brought upon this judgment against D'Arcy in Louisiana. He contended that the judgment in New York against him was void for want of service. A judgment was rendered against him and this was reversed. The court said, p. 174:

> "And this brings up the question, whether the New York statute, and the judgment founded on it, bound a citizen of Louisiana not served with process; or, in other words, whether the judgment had the same force and effect in Louisiana that it had in New York. It is a question of great stringency. If it be true that this judgment had force and effect beyond the local jurisdiction where it was rendered, joint debtors may be sued in any numbers, and if one is served with process, judgment may be rendered against all; by which means the debt will be established; and as it must happen, in numerous instances, that one debtor may be found in a state carrying on so great a portion of our commerce as New York does, this mode of proceeding against citizens of other states and persons residing in foreign countries, may have operation in all parts of the world, and especially in the United States. If New York may pass such laws, and render such judgments, so may every other state bind joint debtors who reside elsewhere, and who are ignorant of the proceeding. That countries foreign to our own, disregard a judgment merely against the person, where he has not been served with process, nor had a day in court, is the familiar rule; national comity is never thus extended. The proceeding is deemed an illegitimate assumption of power, and resisted as mere abuse. Nor has any faith and credit, or force and effect, been given to such judgments by any state of this Union, so far as we know; the state courts have uniformly, and in many instances, held them to be void, and resisted their execution by a second judgment thereon; and, in so holding, they have altogether disregarded, as inapplicable, the constitution and laws of the United States. We deem it to be free from controversy that these adjudica-

> tions are in conformity to the well-established rules of international law, regulating governments foreign to each other; and this raises the question, whether our federal constitution and the acts of congress founded on it have altered the rule?"

The court then considered whether the "full faith and credit" clause of the constitution and the Act of May 26, 1790, enacted to carry that cause into effect changed the rule. The law as it existed prior to the adoption of the constitution and to the Act of 1790 was examined and it was held that this act of Congress and the constitutional provision must be construed in the light of the law as it then existed. Continuing on page 175, the court said:

> "On the other hand, the international law, as it existed among the States in 1790, was, that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force.
>
> Subject to this established principle, Congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule, which would bind the citizens of one state to the laws of another; as must be the case if the laws of New York bind this defendant in Louisiana. There was no evil in this part of the existing law, and no remedy called for, and in our opinion, Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments, as they had in the state where made. The language employed is not only fairly open to construction, but the result arrived at by the court below, depends on construction; and when we look to the previous law, and the evil intended to be remedied by the framers of the constitution and by Congress, we cannot bring our minds to doubt that the Act of 1790 does not operate on, or give additional force to, the judgment under consideration; we concur with the various decisions

> made by state courts, holding that Congress did not intend to embrace judicial records of this description, and are therefore of opinion that the defendant's exception was valid, and that the judgment must be reversed; and so order."

This is a leading case and its doctrine has never been overthrown.

Pennoyer v. *Neff*, 24 L. Ed., 565; 95 U. S., 714.

In 1866 one Mitchell obtained a judgment in Oregon against Neff in an action brought by him upon a demand for services as an attorney. At the time that action was commenced and the judgment rendered Neff was a nonresident of the state. He was not personally served with process and did not appear. The judgment was entered upon his default in not answering the complaint upon a constructive service of summons by publication. The code of Oregon provided for such service when an action was brought against *a nonresident and absent defendant, who has property within the state.* It also provided, where the action was for the recovery of money or damages, for the attachment of the property of the nonresident. An execution issued on this judgment and was levied on a tract of land in Oregon owned by Neff, which was sold under the execution sale to Pennoyer and Neff brought this action to recover the possession of this tract of land. He asserted the title by a patent of the United States issued under an act of Congress. Pennoyer claimed title under the sheriff's deed. The case turned upon the validity of this judgment. There was a judgment in favor of Neff which this court affirmed, saying (p. 568):

> "The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other

> forum, as has been said by this court, an illegimiate assumption of power, and be resisted as mere abuse."

The court pointed out that the property sold by the sheriff had not been attached nor in any way brought under the jurisdiction of the court:

> "Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, *rendered against a non-resident without service of process upon him in the action, or his appearance therein.*"

The trial court based its ruling upon some questions which arose as to the sufficiency in the affidavit filed upon which the order of publication was obtained and did not think that an attachment of the property was essential to the jurisdiction of the court or the validity of the sale. This court did not agree with the trial court in its conclusions as to the sufficiency of the affidavit, and had this been the only question, it would have reversed, but likewise did not agree with the trial court in its conclusion as to the sufficiency of the service to enter a judgment *in personam* and for that reason affirmed.

The court said (p. 568):

> "If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the state court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding *in rem;* that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding

> our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence every state has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred. The other principle of public law referred to follows from the one mentioned; that is, that *no state can exercise direct jurisdiction and authority over persons or property without its territory.*"

The court pointed out that the state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demands of its own citizens against them, etc., but said (p 569):

> "If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate.
>
> These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases."

The court discusses the conditions under which constructive service may be sufficient, *i. e.*, proceedings *in rem*, and then says (p. 570):

> "But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident *is inffectual for any purpose*. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability."

Quoting from *Webster* v. *Reid*, 11 Howard, 437, the court said:

> " 'No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, *until after the judgments*. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold.'
>
> The force and effect of judgments rendered against nonresidents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several states, as attempts have been made to enforce such judgments in states other than those in which they were rendered, under the provision of the constitution requiring that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state'; and the act of Congress providing for the mode of authenticating such acts, records and proceedings, and declaring that, when thus authenticated, 'They shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they

> are or shall be taken.' In the earlier cases, it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable *only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter.*"

Referring to *Thompson* v. *Whitman,* 18 Wall., 457, the court said it was there held that "the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence."

> Again (p. 572): "Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance."
>
> Again (p. 572): "As stated by Cooley, in his treatise on Constitutional Limitations, for any other

> purpose than to subject the property of a nonresident to valid claims against him in the state, 'Due process of law would require *appearance or personal service* before the defendant could be personally bound by any judgment rendered.' "

In this opinion the court took the position that a personal judgment against a nonresident without personal service upon or the entry of his appearance would be void in the state where rendered as well as elsewhere, and this is the logical position in view of the holding that the process provided for, whatever it may be, cannot run outside of the state for any purpose.

This is probably the leading case in the books on the subject and has been extensively followed throughout the country.

Caldwell v. *Armour et al.*, 43 Atl. (Del.), 517.

Caldwell was a citizen and resident of Delaware. Armour & Co. was a partnership. The members of the firm were all residents and citizens of Illinois. The firm had a branch in Delaware. One Penley was the manager in charge of it. Caldwell sued Armour & Co. to recover for a personal injury on a cause of action which arose in Delaware and served the summons on Penley as the manager or agent under a Delaware statute which provided that

> "whenever suit shall be brought against any person or persons not residing in this state, but doing business therein either by a branch establishment or agency, it shall be sufficient service of a writ of summons to leave a copy thereof with any agent, or at the usual place of business of such person or persons, or his or her, or their, agent ten days before the return thereof."

The defendants appeared specially and moved to set aside the return of the sheriff, claiming the service was void because, first, it was contrary to Section 2, Article 4,

U. S. Constitution—the privileges and immunities clause; and second, it was contrary to Section 1, 14th Amendment, U. S. Constitution—due process clause.

The return of the sheriff was set aside. The court pointed out that in Delaware the ordinary statutory mode of service upon the defendant of a writ of summons in a personal action was "by stating the substance of it to him personally, or by leaving a copy of it at his usual place of abode, in the presence of some white adult person, six days before the return thereof."

This was a different provision from the one with reference to service upon nonresidents. It was argued that the statutory mode of service by copy upon the nonresident doing business in Delaware was as fair and just as the statutory mode of service by copy upon the resident citizen.

The court then pointed out the difference between a foreign corporation and a nonresident doing business in Delaware, also that it did not appear that defendants had done anything from which the court might infer their consent to be bound by the service of process made in this case. After examining the federal decisions the opinion concludes thus (p. 520):

> "In view of these decisions, it is not material whether the mode of constructive service provided for nonresidents doing business here is as effective for the purpose of actual notice as that provided for residents, or whether that provided for such nonresidents is better than certain other modes of constructive service which have been condemned as insufficient. Nor is it material that the service in this case was likely to result, or that it did in fact result, in actual notice to the defendants of the pendency of this action. We are of the opinion that the said statute, under which the service of the said alias summons was made, so far as the same is applicable to this case, is unconstitutional, being in violation of Section 2, Art. 4, of the Constitution of the United

> States, and also in violation of Section 1 of the Fourteenth Amendment, and that by the said service this court did not obtain jurisdiction of the defendant in this case."

Cabanne v. *Graf*, 92 N. W. (Minn.), 461.

Graf was doing business in Minnesota and had been for some months. Cabanne sued him for breach of contract and had the summons served on an agent of Graf. There was no seizure of property. It was a proceeding *in personam*. A judgment was obtained by default. Graf then appeared specially and moved the court to set aside the judgment as void. Upon denial of the motion he appealed and there was a reversal.

The Minnesota statute provided in effect that whenever a cause of action exists in favor of a resident of that state *against any nonresident individual, association, or copartnership engaged in business* in that state, by reason of such business, the summons might be served upon the manager, superintendent, foreman, agent, or representative of such individual, association or copartnership *while in charge of such business, with the same effect as if it were personally served*. Section 2 of the act provided that the summons in such cases in the absence from the state of the defendant, of which the sheriff's return should be *prima facie* evidence, might be made by delivering a copy to the agent or representative of such nonresident defendant *while he was in actual charge of the business out of which the cause of action arose*. The court said it did not consider whether the statute was valid as applied to associations and partnerships to the extent of binding property because the case before them was one of an individual.

It was held that the statute was void as applied to an individual because it did not amount to due process of law. The plenary jurisdiction of the state over all property within its limits and the right to seize and subject it to the payment of the debts of the owners thereof, whether citizens of the state or not, "upon such reasonable notice as the Legislature may prescribe," was recognized; but the court said (p. 461):

> "But the power of the state to personally affect, by the judgments of its courts, citizens of another state, without personal service of process upon them *within the state,* is quite another matter. Prior to the decision in the case of *Pennoyer* v. *Neff*, 95 U. S., 714, 24 L. Ed., 565, it was the law of this state, and in some other jurisdictions, that, if a nonresident defendant had property in this state, its courts had jurisdiction, without seizing it, to proceed by publication of the summons, and render a judgment *in personam,* valid within the state to the extent of any property of the defendant therein. * * * Such, however, is not now the law, for a statute authorizing such a proceeding would not be due process of law." (Citing cases.) "*Pennoyer* v. *Neff* is the leading authority in support of the now well-settled proposition that, except as to proceedings affecting the personal status of the plaintiff, or *in rem,* or as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to set aside fraudulent transfers thereof, or to obtain judgment enforceable against property seized by attachment or other process, no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, *no matter what the prescribed mode of service of process against him may be. An attempt to do so is not due process of law.*" (Authorities are cited.) "Now, unless the fact that a nonresident natural person does business in this state which is in charge of an agent creates an exception to this rule, the act here under consideration is unconstitutional as to such a party. *Clearly, such a case is not an exception to the rule,* for the mere fact that a natural person carries on business in this state by an agent cannot affect the question of the jurisdiction of our courts *over him personally.* The court may seize his

> property within the state by its process, and, upon such reasonable constructive notice to him as the legislature may direct, apply the property to the payment of his debts; but the legislature cannot declare that to be personal service on a citizen of another state, not actually found within the state, which is not so in fact. Such nonresident person, unlike a corporation, carriers on business in this state not by virtue of its consent, but by virtue of the federal constitution which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; hence it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent. He submits his property which he sends into the state to the jurisdiction of its courts, but not his person. *Caldwell* v. *Armour*, 43 Atl., 517; *Brooks* v. *Dun* (C. C.), 51 Fed., 138. In each of the cases cited it was held that a statute which authorized service of summons, in a personal action on a nonresident natural person to be made on his agent in charge of his business within the state, was unconstitutional, because it was in violation of section 2, art. 4, of the federal constitution, and of section 1 of the fourteenth amendment."

Moredock v. *Kirby*, 118 Fed., 180.

This case involves Subsection 6 of Section 51 of the Kentucky code which is involved in the case at bar.

Clara Moredock, a citizen of Kentucky, sued Kirby, a citizen of Pennsylvania, who was doing business in Kentucky under the name of F. M. Kirby & Co. The action was to recover damages for slander and alleged false imprisonment. A summons was served on one Dodge and the return was as follows:

> "Executed July 15, 1902, on F. M. Kirby, doing business under the firm name of F. M. Kirby and Co., by delivering a copy of the within summons to C. P. Dodge, the person in charge of the business of said F. M. Kirby, at No. 504 and 506 Fourth avenue,

> Louisville, Ky., the said F. M. Kirby being a nonresident of the state of Kentucky, but being engaged in business in the state of Kentucky at Nos. 504 and 506 Fourth avenue, Louisville, Kentucky."

The defendant appeared specially and upon his petition the cause was removed to the federal court, and upon removal defendant moved to quash the sheriff's return. The motion was sustained. The following are extracts from the well-considered opinion of the court:

> (p. 181): "The determination of the motion to quash the return must, therefore, depend upon the validity of a service made pursuant to this legislation of the State of Kentucky and its efficiency under the constitution of the United States to give the court jurisdiction over the person of a citizen of another state upon whom, confessedly, service was not had unless the service indicated by the return must be held constructively to have given the defendant the notice which he was entitled by law to have before a court acquired jurisdiction over his person. Subsection 1, sec. 2, art. 4, Const. U. S., is in this language:
>
> 'The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several state.'"

The court said this provision was mandatory and could not be ignored by the court.

> (p. 182): "It is not claimed that a state court, under the legislative act above copied, could, by the sort of service had in this case, acquire jurisdiction over the persons of citizens of Kentucky unless in the presumably rare instances of their residing elsewhere but continuing to engage in business in Kentucky. Manifestly, under the laws of Kentucky, as the court judicially knows, citizens of that state generally have entire immunity from being subjected to personal judgments for money upon such a service of process in actions at law,—that is to say, citizens of Kentucky generally are exempt from judgments on such service; and, if citizens of Kentucky have such immunity, or are exempt from such consequences, then, in the very language of the constitu-

> tion of the United States, citizens of Pennsylvania are 'entitled' to it also. This is the rule, and citizens of other states could not be deprived of the benefit of its operation, even if the principles of natural justice, to which we shall have occasion to allude, did not intervene. Nor can the rule be changed, and such a result be accomplished, constitutionally, under cover of the very rare exceptions just mentioned of citizens of Kentucky residing out of the state, but continuing to do business here. The constitutional provision deals with the rights of citizens generally, and its operation cannot be contracted by isolated instances."
>
> Again: "If a citizen of Kentucky has the 'immunity' of being exempt, under such circumstances, from a personal judgment, it constitutionally follows that the citizen of Pennsylvania is equally 'entitled' to it."

The court then entered upon an examination of the authorities and said:

> "If, therefore, we went no further, it must be plain upon the face of the Kentucky legislation, when it is tested by the supreme law of the land, that it violates the rights of the defendant as they are guaranteed to him by the national constitution by depriving him of an immunity or exemption allowed to citizens of Kentucky."
>
> Again (p. 184): "It thus appears that the statutes of various states which have attempted to deny or abridge the right of the citizen to personal service of summons as a necessary condition precedent to jurisdiction over him in a judicial proceeding have been held to be wholly ineffectual for the purpose."

Referring to the right to reach property in the state upon constructive service and to establish the status of a citizen, the court continued:

> "But these matters stand apart, and in no way affect the general doctrine of the courts, and especially of the Supreme Court of the United States, that the principles of natural justice require that no one shall be subjected to a money judgment *in per-*

> *sonam* unless he has been duly and personally served with notice of the pendency of the action, or unless he voluntarily appears therein."
>
> Again (p. 185): "While constructive or substituted service—one form of which was attempted to be provided for in the amendment made to the Civil Code of Practice by the act of 1893—is adequate in actions *in rem* or quasi *in rem* as to the thing seized, it is not so as to any judgment *in personam* which may be sought. This is the rule clearly and certainly established by the authorities.
>
> The general question involved in the pending motion may, therefore, be stated to be this: Does the character of service indicated by the sheriff's return on the summons confer on the court the lawful power to hear and determine the cause and render judgment against the defendant if he shall fail to defend it; in other words, does that service give the court jurisdiction over the person of the defendant? What has been said resolves the question in the negative, inasmuch as, in the court's opinion, such a service is a nullity."

The court also held that to sustain such a judgment would be to deny due process of law guaranteed under the Fourteenth Amendment, and also that doing business in Kentucky with such a statute in force was not a consent to be bound by such service. What the court said on this last question has been pointed out earlier in this brief.

Grover v. *Radcliffe,* 137 U. S., 286.

James and John Benge, citizens of Delaware, gave a bond containing a warrant of attorney authorizing any attorney of any court of record in the State of New York or any other state to confess judgment. Judgment was confessed in Pennsylvania by a prothonotary pursuant to a statute of Pennsylvania, no attorney of record being involved. This suit was brought in Maryland on that judgment. The court of appeals of Maryland found that the judgment was void for want of jurisdiction and this court found likewise.

In the course of the opinion this court quoted with approval from *Beaver* v. *Boggs,* 38 Md., 255, as follows (p. 297):

> "It is well settled that a judgment obtained in a court of one state cannot be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by *actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction.* Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects and credits, of a nonresident defendant there situated; *but it cannot be enforced or made the foundation of an action in another state.* A law which substitutes constructive for actual notice is binding upon persons domiciled within the state where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the state where the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them when they had no opportunity of being heard, its validity is denied."

In *Baker* v. *Baker,* 242 U. S., 394, a man died intestate, leaving a widow in Tennessee and a mother in Kentucky. He left personal property in both states. Under the laws of Tennessee all personal property went to the widow, while under the laws of Kentucky one-half went to the widow and the other half to the mother. It was a question in dispute whether he died domiciled in Tennessee or Kentucky. Without reciting all of the steps taken by the parties suffice it to say that the widow instituted chancery proceedings in Tennessee against the mother and others with a view to procuring title to the whole of certain personal property in Kentucky. An order of publication was made, citing the mother as a nonresident to make defense. She failed to appear and the bill was taken as confessed against her. A decree was entered finding that the decedent was domiciled in Tennessee and awarding the property in question to the widow.

Later the widow went into Kentucky and instituted proceedings in equity to recover the Kentucky property basing her title upon the Tennessee decree. The mother intervened and attacked the validity of the Tennessee decree for want of jurisdiction. The court dismissed the widow's petition and this was affirmed by the Court of Appeals of Kentucky (162 Ky., 683; 173 S. W., 109). On writ of error this court affirmed the judgment, the sole question being whether the Tennessee decree was entitled to recognition in the courts of Kentucky in view of the failure to acquire jurisdiction over the person of the mother.

On page 400 it was said:

> "And the question remains, How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law, that is, either by a proceeding *in rem* in a court having control of the estate, or by a proceeding *in personam* after service of process upon the parties to be affected by the judgment."

On page 401:

> "All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky court, that the Tennessee judgments had no effect *in rem* upon the Kentucky assets now in controversy. She invokes the aid of those judgments as judgments *in personam*. But it

is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam to* extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.

This rule became established long before the adoption of the Fourteenth Amendment, as the result of applying fundamental principles of justice and the rules of international law as they existed among the states at the inception of the government. Notwithstanding that *Mills* v. *Duryee* (1813), 7 Cranch, 481, 484,—where, as the opinion shows, the defendant had full notice of the suit, was arrested, and gave bail,—was by some courts interpreted as holding that irrespective of such notice the act of Congress required a judgment under all circumstances to receive the same faith and credit in every other state as it had in the state of its origin (*Field* v. *Gibbs* (1815), Pet. C. C. 155, 158; Fed. Cas. No. 4766, 9 Fed. Cas. 15, 16; *Commonwealth* v. *Green* (1822), 17 Massachusetts, 515, 546), the view soon came to prevail in the state courts that the case was not authority for so broad a proposition, and that whenever a judgment of a state court was produced as evidence, the jurisdiction of the court rendering it was open to inquiry, and if it appeared that the court had no jurisdiction the judgment was entitled to no faith or credit.

Mr. Justice Story, who wrote the opinion in *Mills* v. *Duryee*, in his treatise on the Conflict of the Laws, published in 1834 (§ 609), declared that the 'full faith and credit' clause and the act of Congress did not prevent an inquiry into the jurisdiction of the court to pronounce the judgment, and this view was adopted and made the basis of decision by this court in *D'Arcy* v. *Ketchum* (1850), 11 How. 165, which was followed by *Thompson* v. *Whitman*, 18 Wall. 457, 459, with a review of many cases.

During the same period, however, it occasionally was intimated, if not held, by some of the state courts, that a personal judgment effective within the territory of the state could be rendered against a nonresident defendant who did not appear and submit himself to the jurisdiction, provided notice of the suit had been served upon him in the state of his residence, or had been published in the state within which the court was situate, *pursuant to the provisions of a local statute.* See *Smith* v. *Colloty,* 69 N. J. L. 365, 371. As was said by Mr. Justice Field, speaking for this court in *Pennoyer* v. *Neff,* 95 U. S., 714, 732, it is difficult to see how such a judgment could legitimately have force even within the state. But until the adoption of the Fourteenth Amendment (1868) this remained a question of state law; the effect of the 'due process' clause of that amendment being, as was held in the case just mentioned, *to establish it as the law for all the states that a judgment rendered against a nonresident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the state whose court had rendered it, and to make the assertion of its invalidity a matter of federal right.*

The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, 236; *Simon* v. *Craft,* 182 U. S. 427, 436; *Grannis* v. *Ordean,* 234 U. S. 385, 394. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a state is required to come within its borders and submit his personal controversy to its tribunals *upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a state beyond its own territory.*"

On page 404:

"Moreover, plaintiff in error relies not merely upon this judgment, but upon the decree in the chancery court of the same county, which in form specifically determined her exclusive right to the Kentucky personalty. It results, however, from what we have already said that this right could not be conclusively established by any Tennessee court as against a resident of Kentucky who was not served with process and did not appear therein, and that the Kentucky courts did not go counter to the federal con-

> stitution and the act of Congress in refusing to give faith and credit to the Tennessee judgments."

Brooks v. *Dun*, 51 Fed., 138.

R. G. Dun & Co., copartners, citizens and residents of New York, had a branch office in Memphis with an agent, Patterson, in charge. Brooks brought suit in the state court of Tennessee against R. G. Dun & Co., and had the summons served on Patterson as agent under authority of a Tennessee statute. Defendants entered a special appearance and moved to dismiss the case because the service was not valid. The case was removed to the federal court and the motion renewed. The court treated the motion as one to set aside the service, and in a well considered opinion sustained it. The court said (p. 147):

> "Since the case of *Pennoyer* v. *Neff*, *supra*, the question there decided has been often before the circuit courts, and in various forms, and their decisions have been uniformly adverse to the validity of service in such cases as this without personal service of the defendant in the state where the suit is brought, or his voluntary appearance therein."

Louisville & Nashville R. R. Co. v. *Nash*, 118 Ala., 477; 41 L. R. A., 331.

The Railroad Company was a Kentucky corporation doing business in that state and in Alabama and Tennessee. Nash, a resident of Alabama, was employed by the company. He sued the company in Alabama to recover the amount of wages due him. The company set up in defense that an attachment suit had been started against Nash in Tennessee and it had been garnished, had answered, and that judgment had been entered against it for the money involved in the Alabama suit, which judgment it had paid. Nash was not personally served with notice in the garnishment suit and did not appear, but service was had by publication in accordance with the Tennessee laws. He claimed that the judgment in Tennessee was void for the reason that the situs of the debt was in Alabama, hence this debt could not be considered as property in Tennessee and no judgment could be rendered against him *in personam* for want of service, hence the Tennessee judgment and the payment thereof by the company was no defense. The trial court in Alabama sustained this position and entered judgment against the company which was affirmed on the ground that there being no property of Nash's in Tennessee and no personal service upon him in that state or voluntary appearance by him, the Tennessee court was without jurisdiction and its judgment was without due process of law; also that to such judgments the Constitution of the United States does not require that any faith and credit be given.

See also:

Ashland Exchange Bank v. *Wiley*, 49 L. Ed., 184; 195 U. S., 257.
Blessing v. *McLinden*, 79 Atl., 347.

Plaintiff's counsel lay great stress upon the fact that the Court of Appeals of Kentucky sustained the constitutionality of this Kentucky statute in *Guenther* v. *American Steel Hoop Co.*, 116 Ky., 586; 76 S. W., 419; but it is perfectly clear from this opinion that the court realized that it did not follow that because a judgment against a nonresident rendered upon such service might be sustained by the courts of Kentucky, such a judgment would be recognized when sought to be enforced through the courts of other states, for in commenting upon *Grover* v. *Radcliffe*, cited *supra*, the Kentucky court said (p. 420):

> "The judgment complained of was not rendered on constructive service of process, *nor is the question now raised as to what effect should be given the*

> *judgment beyond the confines of this state, where the statute authorizing the mode of service which was followed is without force."*

The learned author of Black on Judgments in Section 906, *supra*, recognized that the courts of a state might be inclined to sustain a service against nonresidents which would not be recognized by the courts of other states. This was said:

> "The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes, but no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court."

This court in *Grover* v. *Radcliffe, supra*, recognized the possibility of a judgment being held valid by the courts of the state where rendered, but invalid by the courts of every other state, for in that opinion it is said, referring to a judgment entered without the court entering it having acquired jurisdiction over the defendant *by actual service of process upon him or by his voluntary appearance to the suit and submission to that jurisdiction* (p. 297):

> "Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects and credits, of a nonresident defendant there situated; *but it cannot be enforced or made the foundation of an action in another state."*

Whatever sanction may be given by the Supreme Court of Kentucky to the method of obtaining jurisdiction over nonresident natural persons as was employed in this instance, where the question whether such method constitutes due process of law within the meaning of the Fourteenth Amendment is properly presented to this court for decision, this court will exercise an independent judgment upon it.

Grannis v. *Ordean*, 234 U. S., 385, 394.

Counsel's main support for their position that the courts of Illinois should sustain their contention that the Kentucky court had jurisdiction of the person of the defendants is found in a *dictum* in *Pennoyer* v. *Neff*, which the court disposed of by saying in conclusion:

> "In the present case, there is no feature of this kind; and, *consequently, no consideration of what would be the effect of such legislation* in enforcing the contract of a nonresident can arise."

It is perfectly clear from the authorities to which we have called attention that service against a nonresident by serving an agent under such a statute as the one in Kentucky is not good because such service does not constitute due process of law within the meaning of the federal constitution. The same rule applies to individuals sued as partners as applied to individuals sued alone. A partnership is simply a number of individuals doing business under a partnership name. It is not a legal entity as distinguished from the individuals who compose it. That question is set at rest in Illinois in *Abbott* v. *Anderson*, 265 Ill., 285, wherein it was said (p. 290):

> "The theory that a partnership is a legal entity distinct from and independent of the persons composing it has never been recognized in the law of this state."

The same doctrine was announced in *Francis* v. *McNeal*, 228 U. S., 695.

A service against an individual as contradistinguished from a member of a partnership which falls short of due process of law cannot meet the requirements of due process of law simply because that individual is a member of a partnership and sued as such, if it be true that a partnership is not a legal entity distinct from and independent of the persons composing it.

Section 1 of the Fourteenth Amendment of the federal constitution which guarantees due process of law is a limitation upon the power of every legislature within the United States. It is the supreme law of the land. It is a right which cannot be taken from any citizen of the United States by any one of the states.

The plaintiff did not go into the courts of Illinois and ask to have his judgment enforced as a matter of grace or comity. He went there as a matter of right, but he went subject to the right of the Illinois courts to inquire into the jurisdiction of the Kentucky court. The defendant William Farson in calling upon the Illinois court to determine whether he had due process of law in the Kentucky court, did not ask for a favor, but he called for the exercise of a constitutional right. For him as a citizen of Illinois the federal constitution said to the courts of Kentucky that they could not get service upon him in that state in an action *in personam* by any method short of what is due process of law under the federal constitution, and therefore the Illinois courts had the right to determine whether the service relied upon in this case measured up to due process of law.

In the case of *Alaska Commercial Co.* v. *Debney,* cited by plaintiff, a Canadian judgment was sought to be enforced in Alaska, not under any constitutional right but simply as a matter of comity. Manifestly there was no question in that case of due process of law or equal privileges and immunities because the proceedings in the Canadian court were not had under the authority of or in any way subject to the United States Constitution.

Plaintiff cites *in re Grossmayer,* 177 U. S., 48, where the court said that in the absence of local statute no valid judgment can be rendered against the members of a partnership without service upon them. This is all that was held by the court and it cannot be considered as an authority that if there was a local statute authorizing judgment *in personam* against a nonresident by service on an agent it would be good when sought to be enforced in another state.

Decisions in foreign courts where our constitution is not in force and decisions relative to corporations can be of no value when considered in a case involving the rights of a citizen of one of our states under the Constitution of the United States when being sued in another of our states. Such cases cited by plaintiff need not be further discussed.

Ballard v. *Hunter*, 204 U. S., 241, may be disposed of with the suggestion that it was a proceeding *in rem.* The property sought to be reached was within the jurisdiction of the court. The court said:

> "The land stands accountable to the demands of the state and the owners are charged with the laws affecting it and the manner by which those demands may be enforced."

We do not see how *Kane* v. *New Jersey*, 242 U. S., 160, cited by plaintiff, can be helpful in the decision of the questions involved in the case at bar. There was no question of jurisdiction presented in that case. The defendant was arrested in person within the limits of the state. The statute there in question was based upon the police power of the state. The contention was that the defendant was discriminated against but it was pointed out that the statute applied equally to residents and nonresidents.

In conclusion we submit that whatever may be the effect of this judgment in Kentucky if it were sought to be enforced there, it cannot be enforced against the defendant in the courts of Illinois because the Kentucky court under the law of the land had no jurisdiction to enter a judgment *in personam* upon the service of summons upon Washington Flexner. The enforcement of such judgment in Illinois would be a denial to defendant, William Farson, a citizen of Illinois, of his constitutional right to due process of law and equal privileges and immunities with the citizens of Kentucky.

III.

THE SIXTH AND SEVENTH PLEAS PRESENT AN ISSUE OF FACT AS TO THE AGENCY OF WASHINGTON FLEXNER.

The Kentucky statute provides that "in actions against an individual *residing* in another state, or a partnership * * * the members of which *reside* in another state, *engaged* in business in this state, the summons may be served on the manager or agent of or person in charge of *such business* in this state * * *."

This language is all in the present tense referring to the time such action is brought. The theory upon which plaintiff's second amended declaration is drawn is that defendants were nonresidents of Kentucky and Washington Flexner was their agent in that state for the purpose of service *at the time the Kentucky suit was commenced.* He alleges that "under the laws of said state the said Washington Flexner continued from said December 11, 1911, *until the institution of the said suit* in Jefferson County to be the agent of the defendants on whom process could be served in suits or proceedings arising out of said transactions." (Tr. of Rec., 36.) In this action brought in Illinois the laws of Kentucky are facts which like any other fact must be pleaded and proven on the trial.

In *McAllister* v. *Kuhn,* 96 U. S., 87, 89, it was said:

> "For the purposes of pleading the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence but they have no place in the pleadings."

See also:

Edwards v. *Schillinger*, 245 Ill., 231, 243.
Hoes v. *Alstyne*, 20 Ill., 201, 203.
Marshall v. *Coleman*, 187 Ill., 556, 582.
L. N. A. & C. Ry. Co. v. *Shires*, 108 Ill., 617, 628.

The ultimate fact alleged in the declaration is that Washington Flexner was the Kentucky agent of defendants at the time the Kentucky suit was brought. Whether he was the agent by reason of the Kentucky laws or by reason of special contract is immaterial. Proof of the one or the other at the trial would simply be evidence by which plaintiff would attempt to establish the ultimate fact of such agency.

The sixth and seventh pleas squarely traverse this ultimate fact. The language of the statute is followed in the denial of agency. The pleas allege that Washington Flexner was not at the time the Kentucky suit was instituted nor for a long time prior thereto *an agent or manager for or person in charge of* the business of defendants in Kentucky. (Tr. of Rec., 28-29.) This denial is broad enough to include agency by reason of the Kentucky law and agency by reason of special or general contract. It is not limited to either. It is broad enough to include agency for purposes of service of process or for any other purpose. The language of our denial is as broad as the language of the statute. Whatever the language of the statute means so also the language of our pleas mean.

The allegation of the declaration as to Kentucky law is a conclusion of fact and is merely inducement leading to the allegation of agency at the time suit was brought and it was not necessary that it should be traversed separately so long as the ultimate fact was traversed generally.

People v. *Strawn*, 265 Ill., 292, 297.
Stephen on Pleadings (9th Am. Ed.), 243.
Graham v. *Dixon*, 3 Scam. (Ill.), 115.

The declaration nowhere alleges that the contract of agency with Washington Flexner in force when the bonds were sold was thereafter terminated. The allegations of the declaration are consistent with the theory that such contract was still in force at the time the Kentucky suit was brought and the summons served. Hence it was necessary to deny agency *in toto* without regard to the method of its creation or continuance.

This is a pure question of pleading and what the Kentucky law in fact may be is not now important so that the authorities cited by plaintiff are not in point on this demurrer. *The demurrer necessarily admits that Washington Flexner was not defendant's agent in any sense or for any purpose at the time the Kentucky suit was instituted.*

Furthermore in the two Kentucky cases cited (*Nelson Morris & Co.* v. *Rekkopf & Sons*, and *International Harvester Co.* v. *Commonwealth*) the defendants were foreign corporations. As to the Nelson Morris case plaintiff seems to be of the impression that it was a nonresident partnership but upon reading the opinion it will be found that "it was alleged in the petition that the defendants were incorporated and nonresidents of Kentucky." Likewise the syllabus speaks of defendant as a nonresident corporation. Whatever may be the construction by the Kentucky courts as applied to foreign corporations which come into that state as a matter of grace only, it does not follow that the same construction will be applied to nonresident individuals who come into that state under the protection of the federal constitution as a matter of right.

We submit that the sixth and seventh pleas present a good issue of fact and are not subject to attack by general demurrer.

IV.

THE FIFTH PLEA IS A PROPER PLEA.

The fifth plea (Tr. of Rec., 27, 28) was not filed for the purpose of raising the question of proper parties in the Kentucky suit but for the purpose of showing that the Kentucky court did not obtain jurisdiction over all of the parties. The Kentucky judgment is joint and if it is not good as to all it is not good as to any of the defendants.

Claflin v. *Dunne,* 129 Ill., 241, 248.
W. C. St. Ry. Co. v. *Martin,* 154 Ill., 523, 526.
Supreme Lodge K. of H. v. *Goldberger,* 175 Ill., 19.

The return of the sheriff on the summons in the Kentucky suit shows that service was had on *Farson, Son & Co.,* a partnership composed of, etc., by delivering copies to Washington Flexner, *agent for Farson, Son & Co.* (Tr. of Rec., 21.) This service does not purport to have been made on any one but Farson, Son & Co. Who was Farson, Son & Co.? The fact that the sheriff recited that three individuals composed that firm does not preclude any one of them from denying that such was the fact. If it were a fact that John A. McElroy was not then a member of that firm, service on "Farson, Son & Co." was not service on him. There was no attempt made to serve him individually either by personal service or by service upon an agent. Even though he may have been found liable as a partner upon the trial owing to his former connection with the firm, yet in the first instance it was necessary to obtain jurisdiction over him as an individual. Service which purports to have been made on Farson, Son & Co. only, of which firm he was not a member, surely was not service on John A. McElroy as an individual.

Furthermore, the Kentucky Civil Code under which the service in question was had provides for service on an agent in actions against a partnership the members of which "reside" in another state "engaged in business in this state." This language is in the present tense. It contemplates present engaging in business in Kentucky. Courts of Illinois are not required to enlarge this language by construction to the detriment of a citizen of Illinois. If all defendants were not doing business as partners at the time the Kentucky suit was commenced they were not then engaged in business in Kentucky and did not come within the provisions of the Civil Code in question.

The fifth plea was therefore a good plea in bar and not subject to attack on general demurrer.

The practice in Illinois is that where several distinct pleas are pleaded in bar of the whole cause of action and a demurrer is overruled as to any one of them and the plaintiff elects to stand by his demurrer the defendant is entitled to judgment regardless of the other issues. The one plea unanswered constitutes a complete defense to the whole.

Ward v. *Stout*, 32 Ill., 399, 410.
Mt. Carson, C. & R. R. Co. v. *Andrews*, 53 Ill., 176, 184.
People v. *Opera House Co.*, 249 Ill., 106, 112.
People v. *Bug River Drainage Dist.*, 189 Ill., 55, 59.

Weiss v. *Binnian*, 178 Ill., 241, 245.
Olson v. *Mackolite Fire Proofing Co.*, 116 Ill. App., 573, 574.
16 Ency. of P. & P., 567.

Each of the eight pleas was attacked by demurrer in the trial court and the judgment was that each of the pleas was good. Each of the pleas was before the Supreme Court of Illinois and its judgment was that each of them was good even though that court did not see fit to discuss all of them in its opinion. This writ of error is sued out to review the judgment of the Supreme Court of Illinois and not merely its opinion.

In conclusion we submit that the enforcement of the Kentucky judgment in this action would be a denial to defendant of his constitution rights; and that the judgment of the Supreme Court of Illinois was right and should be affirmed.

Respectfully submitted,

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